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Issue Date: 15 January 2013

CASE NO.: 2010-FRS-00030

In the Matter of:

ROBERT POWERS,
Complainant,

v.

UNION PACIFIC RAILROAD COMPANY,
Respondent.

Appearances: B. Patrick Cowen, Esq.
for Complainant

Tim D. Wackerbath, Esq.,
Joseph P. Corr, Esq.
for Respondent

Before: Steven B. Berlin
Administrative Law Judge

DECISION AND ORDER DENYING CLAIM

This is a whistleblower case in which Complainant Robert Powers alleges that Union Pacific terminated his employment in retaliation for his reporting that he was injured on the job. Congress provided protection in Federal Railroad Safety Act ("the Act") for railroad employees making such reports. *See* 49 U.S.C. § 20109. I will find, however, that Complainant's reporting the workplace injury did not contribute to the Railroad's decision to terminate the employment and that the claim must therefore be denied.

Introduction and Procedural History

This matter was tried on July 20 and 21, 2011, in Eugene, Oregon. The parties were represented by their respective counsel of record. Complainant testified on his own behalf and called his wife Ginger as a witness. He also called as adverse witnesses four Union Pacific managerial or supervisory employees: William Loomis, who manages injured workers' claims; Michael

Gilliam, who brought the disciplinary charges that led to the termination; Gaylord Poff, a Union Pacific manager who conducted an evidentiary hearing to inquire into the disciplinary charges; and William Meriwether, Union Pacific's General Superintendant, who made the decision to terminate. The parties jointly called one of Complainant's treating physicians, Dr. Richard Abraham. Union Pacific called John Taylor, who was a manager reporting to William Meriwether at the time of the termination and who was involved in discussions about the disciplinary process and the termination decision. Finally, Union Pacific submitted by deposition the testimony of former employee Leroy Sharrah, who was Complainant's first-line supervisor at the time he was injured. I accepted several stipulations of fact,[1] and I admitted numerous exhibits.[2]

Findings of Fact

Union Pacific is a railroad carrier engaged in interstate commerce within the meaning of the Federal Railroad Safety Act. Tr. 4. It hired Complainant in December 1996, and discharged him on September 3, 2008 for the stated reason of dishonesty in violation of the Company's operating rules. ALJ Ex. 1 at 2 (*see* fn. 1); Tr. 42-43, 76, 254-55, 261-62, E.Ex. BB.

Complainant's union grieved the termination, and on August 25, 2009, a Public Law Board ordered the Company to reinstate Complainant within 30 days, with full back wages and restoration of seniority. Tr. 271, E.Ex. PP. The Company reinstated Complainant – not within 30 days – but in February 2010, and paid him about $8,000 in after-tax back wages; it also reimbursed the Railroad Retirement Board about $20,000 for disability benefits it had paid Complainant. Tr. 87, 124-25, 139-40. The parties dispute the reasons for the delay in the Company's reinstating Complainant; they dispute as well the adequacy of the back wages paid.[3] *Id.* But of primary concern here is that Complainant contends that Union Pacific discharged him in retaliation for his reporting a workplace injury that occurred on Friday, May 18, 2007.

On that day Complainant was operating a rail saw, made a cut, and to remove the saw had to loosen a tightening arm. Tr. 44-47, C.Ex. 10. He struck the tightening arm a couple times with his left hand, after which his hand hurt. ALJ Ex. 1 at 2 (see fn. 1); Tr. 46-48. He reported this to supervisor Leroy Sharrah, who asked him to demonstrate how the incident happened (without

[1] In its "Pre-Hearing Statement of Position," filed July 7, 2011, Union Pacific provided an enumerated list of disputed facts. I have marked the pre-hearing statement as ALJ Exhibit 1 and admit it to the record. At trial, Claimant stipulated to facts numbered on the list as 1-10, 13-14, 16, 20, 23, 27, 31-34, 36-37, 39-42, 44-47, and 50-51. Transcript of Hearing ("Tr.") at 4. I accept the facts asserted in those numbered entries as established. In addition, the parties agreed at the hearing to certain other stipulations, which I also accept. *Id.* These facts are discussed substantively in the "Findings of Fact" in the text below.

[2] I admitted Complainant's exhibits ("C.Ex.") 1-10, 12-13, and 15. I also admitted Complainant's Exhibit 11 other than the medical billing records. (Complainant's proffered exhibit 14 appears as Respondent Employer's exhibit Z.) I admitted Respondent Employer's exhibits ("E.Ex.") A-LL and OO-VV. Respondent withdrew its exhibits MM and NN. I admitted the transcript of Sharrah's deposition as Joint Exhibit ("J.Ex.") 1. I admitted Employer's exhibit WW for the limited purpose of assisting in my review of the surveillance tapes, not for the truth of the matters stated in the exhibit. Tr. 339.

[3] The adequacy of the back wages is the subject of a separate grievance that was pending before a Public Law Board at the time of trial.

actually striking the tightening arm again). Tr. 47-48. Sharrah asked Complainant if he thought he had fractured his hand. Tr. 48. Complainant told Sharrah that he "thought maybe [he] had just bruised it and . . . that it might go away." Tr. 48. Sharrah suggested that, as it was a Friday, Complainant wait over the weekend to complete an injury report, and Complainant agreed. Tr. 48-49. Sharrah said that if there was still a problem on Monday, they would fill out the report then. Tr. 49.

On Monday, May 21, 2007, Complainant told Sharrah that he had rested and iced his hand over the weekend, but it was no better. Tr. 49. Sharrah gave Complainant an accident report form, which Complainant filled out. Tr. 49-50. Complainant was concerned that he and Sharrah might get in trouble for not filling out the form on the day he was injured. Tr. 50. Sharrah advised him to date the injury as having occurred on Monday, May 21, 2007, the same day as he was filling out the report, and that is what Complainant did. *Id.* Rather than figure out the exact location of the injury, Sharrah advised Complainant to note it as having happened at a particular milepost, which as it turns out was in the Eugene Yard, where Complainant had reenacted the incident for Sharrah on the preceding Friday, not in Springfield, Oregon, where the injury had actually occurred; again, Complainant followed Sharrah's suggestion. Tr. 50-51.[4]

After Complainant completed the accident report form, Sharrah drove him to a hospital, where he was seen in the emergency room. ALJ Ex. 1 at 2 (*see* fn. 1); Tr. 51-52. An x-ray was taken, and Complainant was advised to ice the hand, take ibuprofen, and follow up with an orthopedist. E.Ex. J.

Complainant saw orthopedist Thomas K. Wuest, M.D. the following day. ALJ Ex. 1 at 2 (*see* fn. 1). On examination, Complainant reported tenderness and discomfort in parts of his left hand, and he was unable to extend his thumb fully. E.Ex. K at 292. Otherwise, his condition was unremarkable, and x-rays were negative for fracture or dislocation. *Id.*

Dr. Wuest diagnosed a severe contusion with tenosynovitis in the right thumb, and he immobilized the hand with a cast. *Id.* In his report, he wrote: "Work restrictions are to avoid

[4] As Sharrah's efforts to dispute this history were unconvincing, the facts are as Complainant recited them. By the time he testified at a deposition on April 15, 2011, it was nearly four years after Complainant hurt his hand, and it was well over two years after Sharrah had worked at Union Pacific. His recall of the incident was understandably limited.

In particular, Sharrah could not recall the date of the injury. Sharrah Depo. at 9-10. He could not recall if it was right before a weekend. *Id.* He remembered the incident as having happened in the Springfield area, not the Eugene Yard (which is three or four miles away). *Id.* at 11. He could not explain why the injury report refers to the location of the injury as in the Eugene Yard. *Id.* at 14. He could not recall whether he urged Complainant to wait over the weekend before filling out an injury report. *Id.* at 13. He twice evaded a question asking whether, when Complainant first reported the injury, he asked to fill out an injury report; Sharrah answered the question both times by stating only that, if Complainant reported an injury, he was required to fill out a form. *Id.* at 12. Sharrah denied discussing with Complainant whether to put a later injury date on the form because they did not fill out the form on the actual injury date. *Id.* at 37-38.

As I discuss at footnote 6 below, Sharrah was under disciplinary scrutiny because too many employees who reported to him were getting injured. Given that Sharrah had a disincentive to report yet another injury and Complainant's initial feeling that it might go away over the weekend, together with Sharrah's overall limited recall, I find that the events occurred as Complainant testified.

any lifting over five to ten pounds; keep the cast clean and dry; no heavy pulling, tugging, lifting, and etcetera." *Id.* at 293. But he signed a "Medical Status Report" on the same day, in which the lifting restriction was 5 pounds (not 5 to 10), and there was no mention of limiting pulling or tugging; on the other hand, Dr. Wuest explicitly limited the lifting restriction to the left hand, something that he had not done in his chart notes. *Id.* at 291.

Union Pacific accommodated all of the restrictions that Dr. Wuest imposed. Tr. 53. With Sharrah involved in the decision, the Company put Complainant on light duty that required him to get a truck ready in the morning, drive it during the day, and occasionally lift objects under 10 pounds (such as a tool). Tr. 53-54; J.Ex. 1 at 25-26. When arranging the accommodation, Sharrah took into account that Complainant had a commercial driver's license and said he could handle the driving job. J.Ex. 1 at 42-43; Tr. 52.

In addition, Sharrah conducted a more formal reenactment of the incident, using other employees. J.Ex. 1 at 31; E.Ex. C-F. He discussed the incident at a safety meeting for all of the employees who reported to him. J.Ex. 1 at 32-33. His purpose was to avoid a recurrence. For example, he pointed out that it would have been better to loosen the tightening arm by tapping it with a hammer. *Id.* at 33.[5] On May 25, 2007, Sharrah formally counseled Complainant about safer ways to loosen the tightening arm. E.Ex. H. As Sharrah explained, counseling is not initiated with a disciplinary charge; it is not viewed as formal discipline. J.Ex. 1 at 48. In his view, the point of the counseling was to avoid Complainant's getting hurt again. *Id.* at 48-49.

Under the collective bargaining agreement, counseling of this kind ("coaching") is not a disciplinary charge but can result in a one if it is required three times in a six-month period; it is then viewed as a failure to comply with instructions under Rule 1.13. E.Ex. H; Tr. 216. At the time of this counseling, Complainant had had no prior counseling in the preceding six months. *Id.* That makes any resultant discipline in connection with the counseling a remote possibility. Sharrah flatly denied any retaliatory conduct toward Complainant. J.Ex. 1 at 44-45. Union Pacific terminated Sharrah's employment in November 2007, and he testified that, as of that

[5] Complainant testified that the metal knob he hit on the tightening arm should have been fit with a rubber ball and was not. Sharrah could not recall the rubber ball being missing, and the arm photographed in the reenactment shows the rubber ball present. J.Ex. 1 at 31; E.Ex. D-F.

There is evidence to support Complainant's testimony. Each work gang has its own saw. J.Ex. 1 at 31-32. There is nothing to suggest that Sharrah went to the site in Springfield for the reenactment. If he did not, then the saw photographed in the reenactment was one available at the Eugene Yard where Sharrah was working and thus was a different saw from the one Complainant was using at the time of the incident. On the other hand, if Complainant was concerned that the knob was missing a rubber ball, there were several occasions when he could have mentioned this and did not, such as on the injury report.

If the rubber ball was missing, then Sharrah's advice about using a hammer would be impermissible under a Union Pacific rule, which forbids striking metal on metal. J.Ex. 1 at 33. But Sharrah persuasively responded that Complainant still could have loosened the tightening arm more safely by tapping it with a rubber mallet or wrapping it with tape and then using a metal hammer; neither involves metal on metal. *Id.* at 34. He also explained that the metal knob was of a "universal" size that often appeared on other equipment, and Complainant could have "borrowed" a rubber ball from different equipment and used it when loosening the saw arm. *Id.* at 34-35.

I need not decide whether there was a rubber ball on the tightening arm knob that Complainant struck. The point is that in the safety meeting and in the counseling session, Sharrah was offering what he believed to be a safer way to do the task on which Complainant injured himself. I find nothing to bring this into question.

time, the Company was still accommodating Complainant's work restrictions and had not disciplined Complainant. *Id.* at 47-48; J.Ex. 1 at 3 (no discipline while Complainant worked light duty).[6]

Meanwhile Complainant returned to Dr. Wuest on June 5, 2007. E.Ex. L at 5. He said the cast had helped "a little bit" and that he was able to keep driving. *Id.* On examination, there was some crepitation, and he still had some pain when extending his thumb, but the tendon was intact.[7] *Id.* New x-rays were normal, with no sign of arthritis or injury. *Id.* Dr. Wuest added a further diagnosis of mild posttraumatic intersection syndrome. *Id.* He removed the cast, advised Complainant to wear a splint as necessary, and released him for driving duties. *Id.* at 5-6. Complainant continued on the same light duty. *Id.* at 7.

Complainant saw Dr. Wuest again a month later (July 5, 2007). E.Ex. L at 7. He complained of some residual inflammatory symptoms, "a sensation of a little crepitation" at the wrist, and mild swelling and discomfort. *Id.* On examination, the swelling had decreased, but Complainant still reported tenderness at some areas. *Id.* Dr. Wuest prescribed a strong anti-inflammatory. *Id.* He continued the same work restrictions and use of a splint and said that Complainant could continue to drive at work. *Id.* at 4.

Two weeks later (July 19, 2007), Complainant told Dr. Wuest that the anti-inflammatory had helped, and he needed more. E.Ex. L at 10. Dr. Wuest renewed the prescription, got Complainant a new splint, ordered physical and occupational therapy, and eased his work restrictions to 10 to 15 pounds. *Id.* at 10-13. Complainant continued his light duty driving job. Tr. 54.

But when Complainant saw Dr. Wuest again after another month (August 23, 2007), he was still complaining of pain. E.Ex. L at 14. He had been going to physical/occupational therapy and said the therapist had recommended a steroid injection. *Id.* It was now more than three months since he had hit his hand and caused what had been diagnosed as a contusion with no fracture or dislocation, nor any sign of pre-existing problems such as arthritis.

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[6] At the time of Complainant's injury, an injury report could have adversely affected the manager's year-end bonus or pay raise if too many of that manager's subordinates had injuries. J.Ex. 1 at 35. Sharrah admitted that in his last year, four of his subordinates (including Complainant) were injured on the job and that this was considered "a lot" of injuries. *Id.* at 14-16.

Sharrah was well aware of how the injury reports were affecting his own employment adversely. During 2007, Sharrah's manager Todd Wimmer reprimanded him, suspended him with pay, put Sharrah on a "personal development review plan," and ultimately discharged him. *Id.* at 16-21. Wimmer gave several reasons for the discharge, including a failure to remediate Federal Railway Administration defects that could have subjected the Company to fines and on account of which Amtrak had a derailment, and there was improper wide-gauge track on some sidings in Sharrah's territory. *Id.* at 24-25. But Wimmer also stated as one of the reasons for the termination that there were four personal injuries on Sharrah's watch. *Id.*

[7] Crepitation is "a grating or crackling sound or sensation." *See* http://www.merriam-webster.com/medlineplus/crepitation.

On examination, Complainant reported pain, and Finkelstein's test was positive. *Id.* Dr. Wuest changed the diagnosis to "recalcitrant tendinitis." *Id.* He gave Complainant an injection of steroids. *Id.*

Nearly a month later (September 20, 2007), Dr. Wuest wrote a "Medical Status Report" at Union Pacific's request. *Id.* at 15-16. He said that Complainant could continue to work with no pushing, pulling, or lifting over 10 to 15 pounds, while wearing a splint as needed. *Id.* This was four months post-incident, and Union Pacific was still accommodating Complainant with the light duty truck driving job. Tr. 54.

When Complainant returned again on September 26, 2007, Dr. Wuest noted him as "dramatically improved with [the injection]." E.Ex. L at 17. There was still "a little bit" of tendinitis, "a little pain" over one joint of the thumb, and "'every now and then'" the thumb locked up on extension. *Id.* On examination, Finkelstein's was "completely negative," he did "not have much in the way of tenosynovitis of the flexor tendon," but there was "some pain" in one part of the thumb. *Id.*

Dr. Wuest no longer diagnosed tendinitis; he noted only "persistent work-related basilar thumb pain." *Id.* He eased the work restrictions very considerably, to a 50-pound lifting restriction with no more than occasional repetitive movement or gripping with the left wrist and hand (or as tolerated); must avoid using vibratory or impact tools; and must wear a splint when working. *Id.* He completed a "Work Status Report" with the same restrictions. *Id.* at 18. He also decided to request a second orthopedic opinion. *Id.*

Union Pacific had continued to accommodate Complainant with the driving job into the following month (October 2007) despite his ability to manipulate heavier objects. Tr. 54. But in that month – now five months post-injury – it transferred Complainant to another job. Tr. 55.[8] The transfer was occasioned by what appears to be a generally mechanical operation of the collective bargaining agreement. The mechanism is complex, and I discuss it at some length.

Under the collective bargaining agreement for maintenance employees, seniority is defined separately for (1) certain classes of jobs assigned to the Railroad's overall "system"; and (2) other classes of jobs assigned to local "districts." E.Ex. TT at 29. For example, the Oregon Division contained two local seniority districts defined geographically. *Id.* at 32. Complainant had seniority both at the system level and at the district level. Tr. 406. He could bid to work in workgroups (known as "gangs") at either level. *Id.*

The collective bargaining agreement provides that, when a system gang puts out a bid and no worker bids on it, the manager can initiate a recall of any worker who has system seniority on that class of job.[9] Tr. 406. Union Pacific's "Gang Management System" will search for someone with system seniority not already working in that job and recall that person. Tr. 406,

[8] Complainant was unsure whether this transfer was in August or October 2007. Tr. 55. But he did not mention any change in job responsibilities when he saw Dr. Wuest at either of the visits in late August or September. As discussed in the text above, the new job required welding. If Complainant was required to do welding, I conclude that he would have discussed either the transfer or at least the changed job duties with Dr. Wuest. I therefore conclude that the transfer was in October 2007, not August. There is no evidence to the contrary.

[9] Typically the manager would initiate a recall after the second time a bid went unanswered. Tr. 406.

408. If the recalled employee is in a lower class job and refuses the new assignment, she loses her seniority on the system job. Tr. 408; E.Ex. TT at 52 (Rule 23 (e)).[10] Generally, the worker must stay on the job to which she was recalled for at least 90 days unless she bids on an equal or higher job; that is, for 90 days, she cannot bid back down to her former lower class job without losing system seniority. Tr. 409; E.Ex. TT at 48 (Rule 22(b)).

It was in this fashion that Complainant was "force recalled" to a higher paying system welding job in October 2007. Tr. 55. Rather than lose his system level welding seniority, he reported to the job and gave the supervisor a letter that detailed his work restrictions. *Id.* Others on that work gang had restrictions and were being accommodated. *Id.* Complainant's restrictions at the time limited him to lifting 50 pounds, avoiding repetitive movement, avoiding vibratory or impact tools, and not working without wearing a splint. The system manager accommodated Complainant for "a couple of weeks," but then stated that he could no longer accommodate the restrictions, that Complainant could not continue to work, and that he must go home. Tr. 56.

Although it is the employee who initiates job bids under the collective bargaining agreement, Complainant believed that he could not bid for a lesser paying job (such as the district level driving job that he had been doing) without losing his system welding seniority. Tr. 57, 406-07. Unfortunately, Complainant misunderstood the complex rules and could have bid back onto his driving job without loss of system seniority. For, under the collective bargaining agreement, if a force recalled worker takes the job to which he was recalled and finds that the Company cannot accommodate his medical restrictions, the worker may immediately bid back to the district job or any other job that his seniority allows (even lower class jobs) without loss of system seniority. Tr. 408-09, 436-37. The 90-day waiting period does not apply. *Id.* But no one explained this to Complainant, and he did not know of it. Tr. 137-38.

According to Complainant, he wanted to go back to his district (or "section") truck driving job. Tr. 56-57. But not knowing that he could bid on that job without losing system seniority, and (mistakenly as it turned out) taking the system gang manager's statement that he could not be accommodated to apply to all Union Pacific jobs, not just those on the system gang, he made no effort to get back into his job with the local district. *Id.*[11]

Instead, Complainant went on an unpaid medical leave of absence, consulted with Senior Claim Specialist Bill Loomis to make sure he was taking proper steps to get benefits, and then applied for disability benefits with the Company's private disability insurer and with the Railroad Retirement Board. Tr. 58-59. Both of these sources provided benefits, which totaled about half of what Complainant had been earning. Tr. 86, 140. Complainant also retained a law firm and

[10] *See* Collective Bargaining Agreement, Rule 23(e) provides: "Employees regularly assigned to a lower class who are recalled to a higher seniority class must return to such higher class at the first opportunity or forfeit seniority therein . . .. In no event will the employee be held on the former position for more than ten (10) calendar days from date of assignment. E.Ex. TT at 52.

[11] Initially Complainant testified that he asked Sharrah about coming back to the district job and that Sharrah refused. Tr. 59. But when I asked Complainant clarifying questions, he admitted that he only spoke to Sharrah *before* he started on the system welding job, not after the welding gang manager told him he could not accommodate the restrictions. *Id.* Complainant did not bid on or ask the district supervisor about returning to the district job at any time after he started on the system job.

ultimately brought the present case as well as a later claim under the Federal Employer's Liability Act, 45 U.S.C. §§ 51 *et seq*., apparently initiated on March 11, 2009. [12] ALJ Ex. 1 at 8 (*see* fn. 1); *but see* E.Ex. QQ suggesting a possible 2010 filing date).[13]

Given that Complainant's medical condition had not resolved in six months, Union Pacific claims manager Loomis arranged for the Company to offer him vocational rehabilitation. Tr. 173. On November 12, 2007, the Director of Disability Management made the offer. E.Ex. 333. She sent Complainant a brochure describing the program, stated that it was offered without charge, and wrote:

> Union Pacific Railroad employees are the company's most valuable resource. If you are unable to return to work in your existing job, the railroad experience and skills that you have developed may be transferable to another railroad position. By working with a Union Pacific network vocational rehabilitation counselor, together you can determine your vocational future.

Id. The Director provided a telephone number at which Complainant could request a meeting with a rehabilitation counselor. *Id.* Complainant did not respond. Tr. 174.[14]

Meanwhile, Complainant continued his medical treatment. On November 15, 2007, he saw orthopedist Jason D. Tavakolian, M.D., for the second orthopedic opinion that Dr. Wuest had requested. E.Ex. L at 19-20. He told Dr. Tavakolian that he had improved but was frustrated with his overall functioning and was having "excruciating" pain if he hyperextended his thumb, which he said happened "a few times a month." *Id.* at 19.

On examination, range of motion was "slightly" less on the right than the left; there was full strength; Finkelstein's was negative; and there was "slight" tenderness over a joint of the thumb. *Id.* at 20. X-rays were normal. *Id.* Dr. Tavakolian concluded that, after the steroid injection, there was no remaining sign of tenosynovitis. As to the slight tenderness and slightly decreased range of motion, Dr. Tavakolian wrote:

> Really at this point I cannot obtain a more accurate anatomic diagnosis [beyond Dr. Wuest's diagnosis of "thumb pain"]. I suspect that many of Mr. Powers' symptoms will subside with time. I have no further treatment recommendations at this point other than continuing symptomatic treatment.

Id. Dr. Tavakolian returned Complainant to Dr. Wuest's care. *Id.*

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[12] By the time of trial, Complainant had not served the FELA complaint on the Company. ALJ Ex. 1 at 8 (*see* fn. 1).

[13] Complainant's counsel in the FELA case dated that complaint March 11, 2010, but he dated the attached jury demand March 11, 2009. The state court's filing stamp is indecipherable, but the court assigned a case number that suggests a 2010 filing (COV-2010-258). *See* E.Ex. QQ at 197, 201, 202.

[14] Loomis testified that, in his experience, the vocational rehabilitation program had been successful in retraining and then placing workers in a variety of other positions such as railroad security guard or manager of terminal operations or of operating practices. Tr. 178-79. He said that one of the vocational rehabilitation counselors would be better able to give specific examples. Tr. 179.

At the Company's request, Dr. Wuest completed another status report on November 20, 2007, based on his September 26, 2007 examination. E.Ex. L at 22. He kept Complainant on the same restrictions. *Id.*

Complainant saw Dr. Wuest the following week on November 28, 2007. E.Ex. L at 22-23. Complainant reported "a little bit" of wrist pain and "perhaps just a little bit of inflammation." *Id.* at 23. Dr. Wuest did not advise any treatment; rather, he stated that the case was ready for closure and that he would arrange a functional capacity evaluation because Complainant would likely need "some permanent partial restriction to avoid repetitive use of the wrist and/or hand." *Id.*; ALJ Ex. 1 at 3 (*see* fn. 1). Complainant characterized this as Dr. Wuest's saying that he could do nothing further for him. Tr. 60.

Based on Dr. Wuest's referral to an occupational therapy center for the functional capacity evaluation, Complainant saw occupational medicine specialist Dr. Abraham on November 30, 2007. E.Ex. M at 1-4. He complained of pain that he rated at a 5 to 6 on a 10-point scale, worse with movement, and having experienced only moderate improvement since the injury six months earlier in May 2007. *Id.* at 4. This, of course, is inconsistent with his reports to Dr. Tavakolian of "slight" pain and his statement two days earlier to Dr. Wuest that he had "a little bit" of wrist pain and "perhaps just a little bit of inflammation."

On examination, Complainant reported tenderness, Finkelstein's was equivocal, and otherwise all was normal with full range of motion and no crepitus. *Id.* Dr. Abraham reviewed the medical and occupational therapy records. *Id.* He diagnosed "persistent post-traumatic thumb and wrist tendinitis" and ordered magnetic resonance imaging. *Id.* Dr. Abraham recommended no additional treatment. *Id.* He completed a work form indicating that Complainant was to do no lifting over 50 pounds and was to avoid repetitive wrist motion. *Id.* at 6.

At a follow-up visit on December 18, 2007, Dr. Abraham noted that the imaging results showed "mild" tenosynovitis at one location with no tendon tear. E.Ex. M at 10. Dr. Abraham made no change in Complainant's work restrictions and offered no additional treatment. *Id.* at 10.

Complainant also returned to Dr. Wuest for an opinion on the imaging results. Dr. Wuest opined that the results revealed no previously unknown pathology. E.Ex. L at 24. He commented that the tenosynovitis was the same condition he had earlier treated successfully with a steroid injection. *Id.* He saw no need for surgery and returned Complainant to Dr. Abraham's care. *Id.*

Dr. Abraham continued seeing Complainant on a regular basis with no new complaints, no additional treatment, no change in work restrictions, and no more than repeating reports of slow improvement.[15]

At a March 4, 2008 visit, with the same pattern continuing, Dr. Abraham made what he later described as an inadvertent error in his recordkeeping. *See* E.Ex. M at 17-18. In his chart notes,

[15] *See* chart notes for visits on January 8, 2008 (E.Ex. M at 11-12); January 22, 2008 (improving and doing home exercises) (*id.* at 13-14); February 12, 2008 (improving in "baby steps" with occupational therapy and home exercises (*id.* at 15-16).

he continued Complainant's job restrictions as no lifting over 50 pounds and must avoid repetitive wrist motion. *Id.*at 18. But on the separate injury report form, he failed to check the box for "minimize repetitive motion of affected area." *Id.* at 17. The same discrepancy recurred on March 18, 2008. *Id.* at 19-20.

As of that date, Complainant was reporting pain that he rated at only 1 to 2 on the 10-point scale, but Dr. Abraham did not loosen the work restrictions that were keeping Complainant off work. *Id.* at 20. Instead, he completed a U.S. Railroad Retirement Board form on which he repeated the same 50-pound lifting restriction and requirement to avoid repetitive motion. *Id.* at 21. Reporting on the form that Complainant continued to improve, Dr. Abraham estimated a return to work in four weeks. *Id.* Two weeks later, Dr. Abraham returned to his pattern of stating the same work restrictions on his chart notes but not including the avoidance of repetitive motion on the injury report form. E.Ex. M at 22-23.

After another two weeks, on April 15, 2008, the date by which Dr. Abraham had predicted Complainant would be ready to return to work, he noted Complainant as still "approaching maximum improvement." E.Ex. M at 25. He continued the same restrictions, this time including the avoidance of repetitive motion on both his chart notes and the injury report. *Id.*at 24-25.

At month's end – now eleven months post-injury – and with Complainant rating his pain at 2, Dr. Abraham made the same findings but filled out another discrepant status report (no indication about repetitive motion). *Id.* at 27-28.[16] He also referred Complainant back to Dr. Wuest for consideration of another steroid injection. *Id.* at 28. Complainant was unchanged at another examination on May 13, 2008. *Id.* at 30-31. Dr. Wuest administered the steroid injection on May 14, 2008, and made no changes in Complainant's work restrictions, expressly leaving that to Dr. Abraham. E.Ex. L at 25.

During all this time, claims manager Loomis had been receiving medical updates. Tr. 148-50, 166-67.[17] To him, Complainant's improvement seemed very slow. Tr. 147. The Company has an associate medical director on contract. Tr. 147, 160. Loomis routinely talks to this doctor about workers who are off work for medical reasons. *Id.* When they discussed Complainant, the doctor saw no explanation for Complainant's lack of improvement. Tr. 147. Because Complainant was represented by counsel, Loomis' understanding was that he could not call the treating physician to discuss Complainant's slow progress. Tr. 164-65. Loomis also had heard that Complainant might have been involved in some activities that were worth "taking a look at," apparently because they might show him as capable of work. Tr. 147.

Earlier, Loomis had tried to get Complainant back to work by arranging the offer of vocational rehabilitation. Tr. 157, 173, 179. This might have been at least in part, as stated in the letter offering rehabilitation, because the Company saw trained employees as a valuable resource. *See* E.Ex. R. But it was also because, if Complainant (who had hired counsel) pursued a claim under the Federal Employer's Liability Act, the Company's exposure would be reduced if Complainant returned to work. Tr. 180-81. For that matter, offering rehabilitation could strengthen the

[16] Dr. Wuest repeated the same discrepant views on May 13, 2008 about avoiding repetitive motion. *Id.* at 30-31.

[17] The Company conditioned payment of medical bills on receipt of the medical updates and records. *Id.*

Company's FELA defenses if Complainant refused the offer; in that event, the Company could argue that Complainant's future economic losses should be reduced because he failed to take the opportunity. Tr. 181-82.

Whatever his motivation, Loomis took several steps at this time. First, at his request, on May 2, 2008, the Director of Disability Management wrote to Complainant and asked him to reconsider the vocational rehabilitation program. Tr. 174-75; E.Ex. S. Second, Loomis talked with Mike Gilliam, the manager who replaced Sharrah and who could be in a position to return Complainant to his former district level job. Tr. 167-68. And third, on or about May 8, 2008, Loomis hired investigator Jonathon Iguchi to see if he could confirm reports that Complainant was moving equipment from a warehouse, a step that also would be useful in the defense of an FELA claim. Tr. 168; C.Ex. 7; E.Ex. FF at 384.

Iguchi made efforts to observe Complainant on a number of days and was able to record his activity on May 15, 16, and 18, 2008. C.Ex. 7. Union Pacific submitted these video recordings for the record. E.Ex. T. They show the following:

- On May 15, 2008, Claimant wrapped a dry line onto a spool held in his left hand; this involved repeating the same wrapping motion with his wrist 27 times in about 20 seconds (about 1:45 p.m.).

- Complainant was doing a gardening project, building a raised planting bed. With his wife, he carried, one-at-a-time, ten 8-foot long six-by-six timber posts several feet, his wife holding one end of the post and Complainant holding the other, over a period of about seven minutes, working slowly but generally continuously (around 1:53 p.m.).

- Starting about a half-hour later and continuing for 22 minutes (with short breaks), Complainant dug into dirt with a shovel, turned, and threw the dirt to empty the shovel, using his left hand on the handle when digging the shovel into the dirt (2:24 p.m. to 2:46 p.m.).

- Immediately afterward and working alone, Complainant lifted one of the six-by-six posts, starting from one end and raising the post into a vertical position, then lowering it; he used both upper extremities.

- A couple hours later, at 4:40 p.m. Complainant was using both hands to operate a hand drill.

- On the following day, May 16, 2008, Complainant continued to work on the raised planting bed from 1:17 p.m. to 1:25 p.m., using both hands to push and pull a wheeled soil compactor. He stopped once to shovel dirt and on another occasion to swing a sledgehammer nine times.

- Later that day, Complainant drove a trailer to a gun show. He unloaded by hand 10 to 12 boxes of unknown weight and, using both hands, dragged out from the rear of the trailer what appears to be an aluminum ramp for rolling items off the trailer. There was a

heavily loaded, wheeled pallet on the trailer, and Complainant tried to pull it onto the aluminum ramp and down to the street. When that failed, he climbed into the trailer, went behind the pallet and attempted to push it onto the ramp. He pushed first with his left upper extremity. When that failed, he used both upper extremities and leaned his full weight into it. That did not work either. He went alongside the pallet and pumped a pallet jack about 27 times, using both hands. Again, the pallet would not move onto the ramp. He climbed down from the trailer and grasped the ramp. It was slightly arched, and using his left hand, he tried to flatten it.

Leaving the pallet for the moment, Complainant carried more boxes and placed them on a dolly; he used both hands. With the dolly loaded, he wheeled the boxes into a building, first pushing with his left upper extremity, then both. He returned and carried more boxes with both upper extremities. He lifted a 3-drawer cabinet onto a dolly and added more boxes. Still, with these boxes loaded, it appears that the total weight was not too considerable: Complainant's young son wheeled the dolly away easily.

Complainant then carried what appeared to be a narrow, wood display table about 20 feet, using both upper extremities. Finally, he returned to the pallet, which was still on the trailer. He lifted a heavy-appearing box onto the pallet. He pumped the pallet jack another 18 times, using both hands. He was then able to roll the pallet off the trailer and down the ramp. He pulled it a short distance, added some light boxes, and then added about a dozen heavier appearing boxes using both hands. He pulled the wheeled pallet into the building, using his right upper extremity. He returned for about nine more boxes, then again pulled the dolly with his right upper extremity into the building.

This process took about 1 hour, 45 minutes.

- On May 18, 2008, Complainant was preparing to leave the gun show. He was at the trailer and pulled out the aluminum ramp at 5:02 p.m. Another man helped him push a loaded dolly toward the trailer, gathering speed, and then up the ramp, Complainant using his right upper extremity. At 5:30 p.m., he carried back the display table, using both upper extremities. He lifted the heavy-appearing cabinet onto the trailer, followed by some other items, including empty boxes. The process was intermittent and extended over a little more than 30 minutes.

E.Ex. T.

In all, as the parties summarized by stipulation, "Complainant was observed and recorded engaging in various activities, including wrapping a string line, repeatedly lifting 6x6 wood posts, using a shovel, pushing a wheelbarrow, using a hammer, repeatedly lifting a metal trailer ramp, operating a large power drill, pushing and pulling a soil compactor, swinging a sledge hammer, and lifting boxes of ammunition." ALJ Ex. 1 at 4 (*see* fn. 1); *see also*, surveillance report, C.Ex. 7.

Nine days later, on May 27, 2008 – and a full year after the injury – Complainant returned to Dr. Abraham, and said that Dr. Wuest's steroid injection had helped, and that his pain had improved

from a "2" to a "1+." E.Ex. M at 33-34. Dr. Abraham reviewed the occupational therapy notes, found Complainant still not medically stationary, continued the same restrictions (50 pounds, no repetitive movement), and again did not note the restriction on repetitive movement in the status report but listed it only in the chart notes. Addressing the discrepancies between his chart notes and the status reports at the time of trial, Dr. Abraham said that, with the lapse in time he could not be certain, but his best recollection was that the restriction on repetitive wrist motion was supposed to apply during these times. Tr. 374-48.

Meanwhile, Company managers were responding to Loomis' efforts to return Complainant to work. Through the Director of Track Maintenance, a systems level manager wrote to Complainant on May 28, 2008 that he could not accommodate the 50-pound lifting restriction. E.Ex. U. Nothing on this letter, however, expressly limited the denial of accommodation to systems level jobs. *Id.* The letter simply recites the 50-pound lifting restriction and states: "This is to advise that this restriction cannot be accommodated." *Id.* (emphasis in original).

At the local district level, Gilliam was responding separately to Loomis' inquiries about accommodating Complainant's medical restrictions on the light duty driving job at the district level. Tr. 307. As Loomis had received discrepant reports from Dr. Abraham about the repetitive motion restriction, Gilliam needed to clarify whether Complainant's restriction was just 50 pounds lifting with the left hand and thumb, or whether the repetitive motion restriction still applied.[18] Tr. 307-08. Gilliam felt that he could accommodate the 50-pound lifting requirement, but he was less certain about the repetitive motion. Tr. 308. Gilliam decided to call Complainant, and he prepared a list of questions about whether Complainant thought he would be able to perform specific tasks. Tr. 329; C.Ex. 4. He called Complainant on May 29, 2008. Tr. 307.

The call was the first contact Gilliam had had with Complainant: Until then, Complainant had not known who Gilliam was; Sharrah had been Complainant's supervisor on the driving job. Tr. 73-74, 327-29. Gilliam took notes of the phone call. As Union Pacific ultimately terminated the employment for what it viewed as Complainant's dishonesty when answering Gilliam's questions, I recite those questions in full with Complainant's answers as Gilliam noted them:

- When was the last time you visited a doctor? 5/20.

- What are your current restrictions? Doctor says they are the same, but paperwork shows different.

- Have you been living up to your restrictions while you've been off? Off 6 months. Have had pain. Have been within restrictions. Wearing brace a little bit; trying to wean off brace.

[18] Gilliam could not recall whether he learned of Dr. Abraham's discrepant reports and progress notes by reviewing them personally or through Loomis' telling him. Tr. 307. It appears that Gilliam might also have been uncertain whether the restriction against vibrating and impacting tools still applied. Tr. 306. But he addressed that when he questioned Complainant during the phone call. His question was whether there were any restrictions beyond 50-pound lifting. Tr. 308. That gave Complainant the opportunity to add whatever was needed, whether repetitive motion, vibrating tools, tools with impact, or anything else.

- Would you be able to grip a spike maul?[19] Probably could grip & swing; could not twist.

- Would you be able to shovel ballast? Should have no problem. Have done garden work, nothing major. Did wear brace.

- Would you be able to be on your feet for extended periods of time? No issue.

- Would you be able to lift and carry joint bars? Has stayed away from. Pain is in thumb & wrist.

- Would you be able to lift and carry a track jack? No issue.

- Would you be able to lift and carry a spike driver? May be too heavy, and grip would be issue, pound would be an issue. Would try it out.

- Would you be able to lift and carry a spike puller? No issue. Try to test using it.

- Would you be able to lift and carry a rail drill? No issue. Using it no issue.

- Would you be able to lift and carry a rail saw? Unsure. That is what he got hurt on. Left hand may [be] problem.

- Anything more than minimal task, he wears wrist brace. Now wears it 40-50%.

C.Ex. 4. Given that Complainant had been unclear about his restrictions, Gilliam asked him to check with his doctor, clarify, and get back to him. Tr. 333. Complainant never got back to Gilliam with the clarification. *Id.*

A couple weeks after the call, on June 12, 2008, Complainant saw Dr. Abraham and rated his pain at "0" to "1." E.Ex. M at 39. Dr. Abraham still did not give Complainant a full release to return to work without restriction, but he did remove the lifting restriction and told Complainant to avoid repetitive movement and pushing with the left arm and to wear a thumb splint; otherwise he could return to work.

On July 8, 2008, when Complainant reported only "minor pain," Dr. Abraham (still finding Complainant not at maximum improvement or medically stationary) removed the repetitive motion restriction and noted Complainant as "OK for full duty using left thumb brace." E.Ex. M at 36-37; E.Ex. AA. Following these words on the note, the words "as needed" appear to have been added. *Id.* at 36. Dr. Abraham writes: "He should be able to do his regular job." *Id.* at 37.

When the systems level management learned that Claimant's restriction had been reduced, it wrote to him again, this time through the Director, Engineering Quality Management. Following

[19] Swinging a spike maul involves exertion similar to swinging a sledgehammer. Tr. 357.

the same format as the earlier letter denying accommodation, the Director recited the only remaining restriction as "Wear thumb brace when needed, as prescribed by physician," and then, as before, wrote: "This is to advise that this restriction cannot be accommodated." E.Ex. V (letter of July 17, 2008).

Meanwhile, at about the same time, July 15, 2008, Loomis gave Gilliam a copy of the surveillance video. Tr. 341. According to Loomis, he did this to help get Complainant back to work by showing what he was capable of doing; he did not give Gilliam the video to get Complainant disciplined. Tr. 157.

Gilliam viewed the entire video on July 17, 2008. Tr. 309-10, 341. As he testified at trial, he concluded then that Complainant had been dishonest in their phone call six weeks earlier when he said he was just doing light gardening, "nothing major." Tr. 313-15, 332, 357. Gilliam observed that Complainant had said nothing about gun shows, hauling ammunition, hauling military surplus equipment, building a raised planting bed, using power drills and other equipment, or using a sledgehammer or wheelbarrow. Tr. 332, 356. From Complainant's comment that he was doing gardening, "nothing major," Gilliam inferred that he was basically "taking it easy," a characterization that Gilliam testified he found inconsistent with the surveillance video. Tr. 357.

Gilliam sought out his manager John Taylor and Taylor's manager, General Superintendent Meriwether, for approval to initiate disciplinary charges. Tr. 347-49. He showed excerpts of the video to Taylor. Tr. 349. A charge letter issued on July 24, 2008, alleging a violation of Rule 1.6. *Id.*; E.Ex. Y. Gilliam knew that he was charging Complainant with dishonesty, a Level 5 violation (which carries as discipline mandatory discharge). Tr. 254-55, 348. He felt that the charge of dishonesty was appropriate and that the discipline established for that violation was not for him to decide but was built into the process. Tr. 348-49.

Meanwhile, Loomis was still trying to get Complainant back to work. When the systems level managers told him that they could not accommodate the thumb splint, Loomis wrote on July 17, 2008 to Gilliam (and Taylor) to ask whether they could accommodate Claimant at the local level. E.Ex. W. Gilliam responded to Loomis on the following day, July 18, 2008, that the local Portland Service Unit could accommodate Complainant's restriction. *Id.*[20] A letter went out to Complainant to notify him of this on July 21, 2008. J.Ex. 1 at 5.

For this to occur, Complainant had to bid for the job. Tr. 366. Claimant was familiar with the bid system: he had bid on dozens of jobs as a Union Pacific employee. Tr. 411-12. But he did not bid on any jobs between November 2007, when he was taken off the system welding job, and this time in July 2008. *Id.* There were district jobs that Complainant could have bid on at that time and been accommodated. *Id.*; Tr. 346-47. But Complainant understood from the system gang manager's statement at the time he was sent home and from the letters he was getting from Union Pacific that his restrictions could not be accommodated anywhere within the Company, and at least for the first 90 days after he started the welding job, he thought he could not bid back

[20] Gilliam acknowledged at trial that the efforts to get Complainant back to work seem inconsistent with the disciplinary efforts, but he explained that he simply viewed them as two tracks operating side-by-side. Tr. 347.

to the lower class district jobs without loss of his system welding seniority even though the Company could not accommodate his medical restrictions on the system gang.[21]

In any event, I find nothing on the record to show that Union Pacific informed Complainant that it could accommodate his restrictions on the local district job. Instead, Union Pacific proceeded on the disciplinary track. On July 24, 2008, Gilliam notified Complainant that the Company would conduct an "investigation and hearing to develop the facts and place responsibility, if any, that while employed as a Welder . . ., on May 16, 2008, and continuing to May 18, 2008, [he] allegedly failed to stay within [his] medical restrictions." E.Ex. Y. Gilliam alleged in the notice that Complainant had violated the Company's General Code of Operating Rules 1.6, a copy of which he supplied. *Id.* The rule forbids conduct falling into seven categories. *Id.* Nothing in Gilliam's notice identifies which of the categories Complainant was alleged to have violated. *Id.*

Union Pacific assigned the investigatory hearing to Gaylord Poff as "hearing officer." Tr. 211-12. He had extensive experience at the Company, progressing from a switchman job in 1972 into management in 1991, and eventually to a Director of Terminal Operations. Tr. 208-10. He had first acted as a hearing officer in 1996. Tr. 210-11.

Poff began the disciplinary hearing on July 31, 2008. Tr. 218; E.Ex. Z. Complainant's union represented him and raised, among others, an objection to the Company's failure to identify the category of conduct under Rule 1.6 alleged to have been violated. E.Ex. Z at 14-15. Poff stated that Gilliam would have to identify the category and that Poff would then adjourn the hearing to give Complainant (and the union) more time to prepare. *Id.* at 15. Gilliam offered Complainant's medical records and a summary of his telephone call with Complainant. *Id.* 17-37. He identified the particular alleged conduct violation as subpart 4 of Rule 1.6, "Dishonest." *Id.* at 37-38.

The Company's manual, "Policy and Procedures for Ensuring Rules Compliance," includes a "Discipline Assessment Table and Progressive Discipline Table" from which "all discipline is determined." E.Ex. UU at 2. Under the assessment table, discipline for a violation of the dishonesty provision of Rule 1.6 results in "level 5" discipline, which is "permanent dismissal." *Id.* at 11.[22] There is no variation from this rule. Tr. 254.[23]

With Gilliam having identified the relevant provision of Rule 1.6 at issue (*i.e.*, dishonesty), Poff adjourned the hearing until August 13, 2008. E.Ex. UU at 41. At that time, Complainant and Gilliam gave testimony, documentary exhibits (such as the surveillance video) were taken, and

[21] While the record shows that Complainant did not know that he could bid down to his former district job without loss of system seniority as soon as the system gang would not accommodate his medical restrictions, the record is unclear whether Complainant knew that the restriction on bidding down applied only for 90 days irrespective of any medical issues.

[22] As level 5 violations result in a dismissal, they are not part of the progressive discipline program and are not included on the "Progressive Discipline Table." E.Ex. VV.

[23] On occasion, after a dismissal has occurred, the union has contacted management to ask for lenience in return for the discharged employee's giving up any right to appeal or back wages. Tr. 254-55. But the union did not contact General Superintendent Meriwether about such an arrangement in this case, nor did Meriwether contact the union. Tr. 255.

the parties offered argument. Tr. 218-19. A transcript of the hearing was prepared. E.Ex. Z. Complainant did not contend that the Company brought the disciplinary charge in retaliation for his having reported an injury in May 2007 or at any time. Tr. 221.

Under the Company's disciplinary procedures, the next step is that a "reviewing officer" reviews the transcript of the disciplinary hearing and decides whether to impose discipline. Tr. 247. The reviewing officer in this case was General Superintendent Meriwether. *Id.* Meriwether was not among Complainant's managers in 2007 at the time he reported his injury; he became General Superintendent more than a year later, in June 2008. Tr. 246-47. About 1,750 employees reported, through various levels of management, to Meriwether. Tr. 249.

Meriwether first learned of the disciplinary issue involving Complainant when Gilliam told him in late July 2008 of a possible Rule 1.6 violation for dishonest conduct. Tr. 249-50. Gilliam said that he had discussed Complainant's restrictions with him, and then later saw a surveillance video in which Complainant's activities were not as he had described them. Tr. 250.

Meriwether reviewed the disciplinary hearing transcript. Tr. 251. He talked to hearing officer Poff and to Gilliam both before and after the hearing.[24] *Id.* He did not talk to Complainant or his union representatives, nor did he review the surveillance video personally. Tr. 250-52.

Meriwether found that Complainant had engaged in activities that differed from what he had described to Gilliam as well as outside his medical restrictions of no lifting over 50 pounds and no repetitive motion.[25] Tr. 255-56. Meriwether reached this finding from Complainant's involvement in activities such as swinging a sledgehammer, lifting ammunition boxes, handling a drill, lifting posts, and running a compactor. Tr. 257-58. In his experience, ammunition crates and six-by-six posts are heavy, although admittedly some ammunition crates are larger than others, and a crate could be empty. Tr. 258-59. Meriwether testified that, when he made his findings, he was unaware that there was testimony at the disciplinary hearing (from the Company's investigator) that the heaviest ammunition box weighed 49.4 pounds.[26] Tr. 259; E.Ex. Z at 146-147.

Based on his findings, Meriwether concluded that Complainant had violated Rule 1.6's prohibition of dishonest conduct. Tr. 261. As he explained at trial, (1) Complainant's statements to Gilliam that he was only doing light duty and taking it easy were belied by the work he was seen doing on the surveillance tapes, and (2) Complainant's lifting activity and repetitive motion shown on the tapes belied his statement to Gilliam that he was complying with his medical restrictions. *Id.*; Tr. 267. By making this determination, Meriwether was responsible for the

[24] Meriwether testified that he might also have talked to Gilliam's direct manager, Director of Track Maintenance Taylor. Tr. 251-52.

[25] Meriwether testified at a pre-trial deposition that there was also a restriction against using vibrating tools or equipment and that he had found Complainant to have violated that restriction when he used the soil compactor. Tr. 256-57. Meriwether also found that Complainant exceeded the lifting and repetitive motion restrictions, which, if true, was arguably dishonest because it was inconsistent with Complainant's statement to Gilliam that he was complying with his medical restrictions. The using of a vibrating tool is surplus.

[26] There was no testimony at the disciplinary hearing of what the 6x6 posts weighed. Tr. 260. Meriwether reached his conclusion based on his own experience handling lumber.

decision to discharge Complainant from employment. Tr. 248. Union Pacific terminated the employment on September 3, 2008. E.Ex. BB.[27]

In a letter dated October 28, 2008, Complainant's union grieved the discharge. E.Ex. CC. It asserted, among other arguments, that Union Pacific's motivation for bringing the disciplinary charge was that Complainant had retained counsel and was pursuing an FELA claim. *Id.* at 395. As the Union wrote, Complainant "continued to work on his gang during the entire time he was injured," taking on more duties, until he was transferred to the system gang, not accommodated, and sent on a medical leave. *Id.* At that point,

> The Claimant, after much frustration from being held out of service because of his injury . . ., was finally forced to seek legal help under . . . the Federal Employers Liability Act (F.E.L.A.). It wasn't until he sought legal help with is injury that the Carrier turned on him as a loyal employee and conjured up false and baseless allegations.

Id. The Union also argued that Poff was biased and that Complainant was denied due process.

After the Company denied the grievance on December 16, 2008, the Union continued through the grievance process and finally sought review before a National Mediation Board Public Law Board. E.Ex. PP. at 599.

On August 25, 2009, the Board found that Union Pacific had failed to prove a violation of Rule 1.6 by substantial evidence, and it ordered that the Company within 30 days reinstate Complainant in his former position (with seniority and all other rights restored), pay back wages since the discharge, and expunge the disciplinary charge from his personnel record. *Id.* at 598, 603.

The Union did not allege before the Public Law Board that the Company was retaliating because he had reported an injury; the Company's motives were irrelevant. Rather, the Union contended that the discharge breached the collective bargaining agreement because Union Pacific could not bear its burden to prove that Complainant had been dishonest when he said he was complying with his medical restrictions. The evidence that the Board cites in its review of the record went to that question.[28]

Union Pacific reinstated Complainant with back wages, but not within the 30 days required in the Public Law Board's award. Before being returned to work, Complainant was required to do a

[27] Through an administrative error, the termination letter went out over the signature of hearing officer Poff. Tr. 262. The decision was Meriwether's. Tr. 248.

[28] For example, the Board cited as ungrounded Gilliam's finding that Complainant's repetitively wrapping a dry line onto a spool 27 times was repetitive wrist motion outside the doctor's restrictions: the Board observed that Gilliam did not ask Complainant's doctor if that is what he meant by repetitive wrist motion. E.Ex. PP at 600. Gilliam saw Complainant lifting the six-by-six posts, but he did not know what the posts weighed. *Id.* Complainant lifted several boxes at the gun show, but Gilliam did not know what the boxes weighed, and the Company's investigator weighed one of the boxes and found it to be 49.4 pounds, which was within Complainant's 50-pound lifting restriction. *Id.* at 601, 603.

Company physical examination as well as a commercial driver's license physical. Tr. 78-79. There was further delay, which Meriwether attributed to Complainant's seniority, which meant there were no local jobs immediately available, plus the system jobs could not accommodate Complainant's remaining restriction of wearing a splint. Tr. 272. The Company did not return Complainant to work until about February 2010. Tr. 272-73.

Discussion

The Act protects employees of railroad carriers engaged in interstate commerce against discriminatory discharges in retaliation for an employee's having reported a work-related injury. 49 U.S.C. §20109(a)(4). The Act provides in pertinent part: "A railroad carrier engaged in interstate or foreign commerce . . . may not discharge . . . 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 . . . (4) to notify, or attempt to notify, the railroad carrier . . . of a work-related personal injury . . .." *Id.*

The Act incorporates by reference the procedures and burdens of proof for analogous claims under the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121, et seq. *See* 49 U.S. § 20109(d). The burdens established under AIR 21 require a complainant to prove by a preponderance of the evidence that: (1) he engaged in a protected activity or conduct; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the unfavorable action. *See* 49 U.S.C. § 42121(b)(2)(B)(iii); *Henderson v. Wheeling and Lake Erie Ry.*, 2010-FRS-012 (Oct. 26, 2012) at 5-6, 6 n. 15.[29] If the complainant meets this burden, he is entitled to relief unless the employer establishes by clear and convincing evidence that it would have taken the same adverse action absent the protected activity. 49 U.S.C. §§ 20109(d)(2)(A)(i), 42121(b)(2)(B)(iii)(iv); *Henderson* at 6 n. 16.

It is undisputed that Union Pacific is a railroad carrier engaged in interstate commerce and thus falls within the Act, that Complainant engaged in protected activity when he reported a workplace injury on May 18 or 21, 2007, and that Union Pacific discharged Complainant from employment on September 3, 2008. Where Complainant's evidence falls short, however, is on the third element of the *prima facie* case: that the protected activity was a contributing factor in the discharge.

As generally occurs in retaliation cases, Complainant has offered no direct evidence of retaliation. Union Pacific's decision-makers each denied that Complainant's reporting the May 2007 injury contributed to the discharge. *See* Tr. 171-73, 285, 350, 436; J.Ex. 1 at 6 (Gilliam). And Complainant offered no direct evidence to the contrary. I therefore turn to the circumstantial case.

As the Ninth Circuit has observed,

[29] At times the employer's knowledge of the employee's protected activity is listed as a separate element, rather than incorporated into the required showing of causation in the third element (contributing factor). *See, e.g., Hutton v. Union Pacific R.R. Co.*, 2010-FRS-00020 at 9 (2011).

> In some cases, causation can be inferred from timing alone where an adverse employment action follows on the heels of protected activity. *See Passantino v. Johnson & Johnson Consumer Prods., Inc*., 212 F.3d 493, 507 (9th Cir. 2000) (noting that causation can be inferred from timing alone); *see also Miller v. Fairchild Indus*., 885 F.2d 498, 505 (9th Cir. 1989) (prima facie case of causation was established when discharges occurred forty-two and fifty-nine days after EEOC hearings); *Yartzoff* [*v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987)] (sufficient evidence existed where adverse actions occurred less than three months after complaint filed, two weeks after charge first investigated, and less than two months after investigation ended). But timing alone will not show causation in all cases; rather, "in order to support an inference of retaliatory motive, the termination must have occurred 'fairly soon after the employee's protected expression.'" *Paluck v. Gooding Rubber Co*., 221 F.3d 1003, 1009-10 (7th Cir. 2000). A nearly 18-month lapse between protected activity and an adverse employment action is simply too long, by itself, to give rise to an inference of causation. *See id*. (finding that a one-year interval between the protected expression and the employee's termination, standing alone, is too long to raise an inference of discrimination); see also *Filipovic v. K & R Express Sys*., Inc., 176 F.3d 390, 398-99 (7th Cir. 1999) (four months too long); *Adusumilli v. City of Chicago*, 164 F.3d 353, 363 (7th Cir. 1998) (eight months), cert. denied, 528 U.S. 988, 120 S.Ct. 450, 145 L.Ed.2d 367 (1999); *Davidson v. Midelfort Clinic, Ltd*., 133 F.3d 499, 511 (7th Cir. 1998) (five months); *Conner v. Schnuck Markets, Inc*., 121 F.3d 1390, 1395 (10th Cir. 1997) (four months).

Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1065 (9th Cir. 2002) (Title VII). Thus, in *Paluck*, the Court held that the nearly one-year interval between the plaintiff's complaint of harassment and the termination of employment was too long to raise an inference of retaliation. 221 F.3d at 1010. As the Seventh Circuit commented, "A substantial time lapse between the protected activity and the adverse employment action 'is counter-evidence of any causal connection.'" *Filipovic* at 398, quoting *Johnson v. Univ. of Wisconsin*, 70 F.3d 469, 480 (7th Cir. 1995).

Here, Complainant notified supervisor Sharrah of the injury on the day that it happened: May 18, 2007. He formally reported it on the following Monday, May 21, 2007. The termination was more than fifteen months later, on September 3, 2008. The disciplinary process that led to the discharge began with the charge letter on July 24, 2008, fourteen months after the injury report. Nothing on the record shows that Gilliam, who is the manager whose recommendation led to the disciplinary process, considered any discipline before July 17, 2007, when he first saw the surveillance video; that too is about fourteen months after Complainant reported the injury. Even the earliest Company action that in any remote sense could be said to have led to the discipline occurred when Loomis hired an investigator, which was not until a year after Complainant reported the injury. This time line is not only insufficient standing alone to show causation, *see Villiarimo*; *Paluck*; if anything, it "is counter-evidence of any causal connection." *See Filipovic*; *Johnson.*

Looking to other indicators of retaliation, I turn first to supervisor Sharrah, who could have been (and likely was) adversely affected when Complainant reported the injury. Union Pacific was disciplining Sharrah in part because workers who reported to him were getting injured too often. During 2007, Sharrah was suspended, put on a "personal development review plan," and finally discharged, partly for this reason.[30] Consistent with this, Sharrah showed some reluctance to file a formal report of Complainant's injury, at least until it could be confirmed that it was more than something so minor that it would mend on its own over the weekend. A person in Sharrah's position could have retaliatory animus against a subordinate (such as Complainant) who filed an injury report.

But Sharrah's conduct beginning on the Monday after the injury rebuts any suspicion that he retaliated. He promptly gave Complainant the report form to complete and took him for medical care. Diametrically opposite any retaliatory conduct, Sharrah involved himself personally in making sure that Union Pacific would accommodate Complainant's work restrictions with a light duty job. Sharrah not only arranged work within Complainant's medical restrictions, but he also checked with Complainant to be sure it was work that Complainant felt he could do. The work used Complainant's established skills as a truck driver with a commercial driver's license. As Complainant's restrictions slowly eased, nothing suggests that Sharrah urged the Company to require greater exertion from Complainant; on the contrary, Complainant was allowed to continue working as a truck driver. The "coaching" session was not disciplinary and made good sense as an effort to avoid future similar injuries. Finally, Sharrah was discharged before Complainant was transferred to the system welding job, before anything adverse happened to Complainant, and well before the discharge or anything related to it. I can conclude only that Sharrah took no retaliatory action against Complainant, that instead he supported Complainant in continuing his employment without loss of income, and that he left the Company's employ before anything negative befell Complainant. There is no sign of retaliation.

Complainant offered nothing to rebut the Company's evidence that the transfer to the system welding job in October 2007 was simply the routine operation of the bidding and "forced" recall mechanism under the collective bargaining agreement. Neither the people who were involved in the decision to terminate nor Mr. Loomis as claims administrator was involved in the transfer. Similarly, neither the people involved in the transfer process nor the system gang management was involved in the discipline or the decision to discharge Complainant from employment. The forced recall occurred through operation of the "Gang Management System," and the system-level managers were part of a distinct organization, separate from the local district managers who later became involved in the discharge.

I therefore turn to the managers who were involved, directly or indirectly, in the discipline (Meriwether, Taylor, Gilliam, Poff, and Loomis). At the outset, I observe that, unlike Sharrah, none of these managers was in any way personally disadvantaged by Complainant's May 2007 injury report; Complainant's making that report gave none of them a personal reason to retaliate. Indeed, Meriwether and Gilliam were not employed in Complainant's local district in May 2007,

[30] It is not established on the record when Union Pacific began to discipline Sharrah on his subordinates' injuries. It might not have happened until after Complainant's report in May 2007. But I assume for this purpose that Union Pacific was already pressuring Sharrah about such injuries at the time Complainant reported that he was injured.

were in no way involved with the report, and could not have been affected by it. Nor did the report affect the employment of Loomis, Poff, or Taylor.

It is a reasonable inference that Loomis concluded by May 2008 that he should begin marshaling the Company's defenses against a potential FELA claim. Complainant had hired an attorney, and given that Complainant was receiving about half the wages on disability that he received by working, his filing an FELA would be an expected result.

Loomis had what he believed was reason to question whether Complainant was as disabled as his doctor was reporting him to be. He apparently had received some reports that Complainant was moving heavy items. Questioning Complainant's restrictions is reasonable from a lay perspective, in that Complainant had no pre-existing medical problems with his thumb or wrist, laboratory testing was largely negative, when imaging showed a problem, it could be addressed with steroids, and a year had passed since the incident. When Loomis contacted the Company's medical consultant, the consultant advised that there was no reasonable explanation for Complainant's lack of improvement.[31] Loomis moved to strengthen the Company's defenses by doing what he could to get Complainant back to work, repeating the offer of job retraining, and at the same time hiring an investigator in an attempt to discredit the extent of the work restrictions – or at least to show that Complainant could do more than the restrictions would suggest.

Essentially, Loomis was looking for evidence to show: (1) that Complainant's medical doctor was exaggerating the restrictions beyond what was necessary or reasonable; (2) that Complainant was exaggerating his subjective symptoms in his reports to his doctors; (3) that Complainant was turning down the opportunity for retraining to a job he could do; or (4) that Complainant was performing work in excess of the restrictions for personal purposes while telling Union Pacific and those providing disability benefits that he was unable to perform such work.

But nothing about this suggests retaliation; rather, these are reasonable steps to defend the Company against the FELA claim while also potentially assisting Complainant in returning to work. I am not entirely convinced that Loomis gave the surveillance video to Gilliam only to convince him that Complainant could work at the local district level. Loomis had seen the video and could have foreseen that Gilliam might think Complainant had been misrepresenting what he was capable of doing. But Gilliam was not and never had been Complainant's manager, and I accept that, if Loomis were aimed at discipline, the route to that end would not have been through Gilliam. Also, Loomis had been trying to get Complainant back to work as early as November 2007, shortly after he went on medical leave, when he arranged the offer of job retraining; this is consistent with an effort to return him to work later, while also building the Company's defenses on the FELA claim.

Finally, Loomis' motivation in giving Gilliam the video is irrelevant. This is because Loomis played no role in the decision to terminate and only gave Gilliam accurate information. Tr. 172-73. If Loomis had poisoned Gilliam's view of Complainant with knowing falsehoods, this could

[31] Complainant's treating physician and occupational medicine specialist Dr. Abraham acknowledged that workers who sustain injuries such as Complainant's generally recover within eight to twelve weeks, sixteen weeks at the outside. Tr. 372-73.

be a different case. But he did no more than provide Gilliam with an accurate video depiction of activity in which Complainant does not dispute he was engaged.

What then of the managers directly involved in the disciplinary process, a process that Gilliam started in motion and supported, in which Taylor and Poff were involved, and ultimately Meriwether concluded with the discharge decision? I begin again with the facts that Gilliam and Meriwether did not work in Complainant's management at the time that he filed his injury report; that none of the people involved in the discipline were affected by Complainant's filing the report; and that the disciplinary process did not begin for fourteen months after the injury report. But to focus on these managers' thinking when they imposed the disciplinary discharge, I reach the following conclusions.

At times the Company has described in somewhat different ways the manner in which it found Complainant's conduct dishonest. At the time of the Public Law Board proceeding, the Company asserted that Complainant was dishonest in not complying with the restrictions that his medical doctor has imposed. Similarly, in this litigation, the Company asserted that Complainant was dishonest when he told Gilliam that he was complying with his medical restrictions. But the Company also contended that Complainant was dishonest was he said he was only doing some light gardening, from which Gilliam inferred that Complainant was "taking it easy." The first of these invites a specific analysis of what Gilliam watched Complainant doing on the video when compared to the medical restrictions; the second is more of an overview of how Complainant generally described what he was doing and what generally was depicted on the video.

Based on my review of the video, I credit Gilliam's testimony that he concluded Complainant had been less than honest when the two talked on the telephone on May 29, 2008. I do not suggest that Complainant utterly misrepresented his activity level. He did not suggest that he was confined to a bed or led a sedentary life. He said he could grip and swing (if not twist) a spike maul; that he could shovel ballast; that he could be on his feet for extended time; and that he could lift and carry a track jack or a rail drill. But he did say that he would have to stay away from lifting or carrying joint bars because of pain in his thumb and wrist; that lifting or carrying a spike driver might be too heavy and require a better grip than he had; and that he would have to see if he could lift and carry a spike puller or a rail saw. And of greatest significance to Gilliam, Complainant said that he had been doing some gardening, but nothing major.

Comparing Complainant's statements to Gilliam in the phone call to Complainant's activities shown on the video, I must determine whether it is more likely than not that Gilliam subjectively concluded that Complainant had been dishonest in the phone call. That is a different question from the one that the Public Law Board answered when it ordered Complainant reinstated with full back wages. To decide whether Union Pacific had carried its burden, the Public Law Board asked whether Complainant in fact had complied with his medical restrictions; the question I must decide is whether Gilliam recommended discipline, which Meriwether imposed, because he *believed* Complainant had been dishonest, or whether he or Meriwether had some other motive, such as retaliation for Complainant's reporting the injury.[32]

[32] *See also*, *Cotran v. Rollins Hudig Hall*, 17 Cal.4th 93 (1988) (when determining under state law whether there is good cause to terminate, factfinder's role is not to determine whether the misconduct occurred, but whether the employer had reasonable grounds to believe that it had occurred and acted fairly).

The video shows Complainant engaged in far more than what might fairly be understood as some "gardening, nothing major." A fair inference from such a statement might be that Complainant had pulled a few weeds or planted some tomatoes. It would not bring to mind someone carrying (with his wife) ten posts, each eight feet long and measuring six-by-six inches; lifting one of those posts on his own into an upright position and lowering it; shoveling dirt for twenty-two minutes; operating a power hand drill; pushing and pulling a soil compactor; and repeatedly swinging a sledgehammer. Nor is it consistent with Complainant struggling to remove the pallet from his trailer at the gun show. The image of Complainant pushing the pallet, using both arms and hands, and putting his full weight into it, is not the picture, at least to me, of someone engaged in "nothing major." Nor is carrying around several boxes of ammunition, even if they weighed, as it turns out, at most 49.4 pounds. Put together, the work on the raised planting bed and the lifting, pushing, pulling, and carrying at the gun, fairly show activity more extensive than Complainant described when answering Gilliam's questions.

I also find that Gilliam could also reasonably and fairly have concluded that Complainant was exceeding his medical restrictions. True, Complainant said he could swing a spike maul, which is similar to swinging a sledgehammer as seen on the video. Similarly, he said he could shovel ballast, which is similar to shoveling dirt as seen on the video. But Gilliam's concern was more with repetitive wrist motion than the weight restriction. Wrapping a dry line onto a spool twenty-seven times appears to involve repetitive wrist motion. Complainant held the shovel handle in his affected hand and used that hand and wrist with the same motion each time he dug into the soil for twenty-two minutes, again in what appeared to be repetitive. The same could be said of his swinging the sledgehammer nine times, and pumping the pallet jack, first twenty-seven times, and a few minutes later an additional eighteen times. Gilliam was under a misapprehension that Complainant was restricted at the time from using equipment that caused vibration or wrist impact; based on that misunderstanding, the images of Complainant running the power drill and the compactor would have appeared to be inconsistent with Complainant's restrictions.[33] And, while it turned out that none of the ammunition boxes weighed over 49.4 pounds (and thus all were within Complainant's lifting restriction of 50 pounds), the sight of Complainant lifting and carrying these boxes could reasonably have given Gilliam pause.

The Public Law Board rejected Gilliam's (and Poff's) opinion of what amounted to repetitive wrist motion because Gilliam did not contact Complainant's treating physician to ask what the restriction meant. But Dr. Abraham should and more likely than not did understand that intended audience for his medical status reports was employers and other laypersons (such as insurance adjustors). If Dr. Abraham meant some kind of exacting standard to define what was

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[33] To the extent that there was confusion about Complainant's medical restrictions, it resulted from Dr. Abraham's lackadaisical recordkeeping. At the least, Dr. Abraham's progress notes and status reports should have been consistent, and they were not.

Complainant also contributed to the confusion. Because Gilliam was aware of the problem, he asked Complainant to confirm what the restrictions were. Complainant pointed to the difference between what Dr. Abraham said and what he wrote. Gilliam asked Complainant to clarify with Dr. Abraham and get back with him. Complainant never did that.

amounted to excessive repetition, he should have stated that expressly so that an ordinary person would understand it. And at trial Dr. Abraham testified that swinging a sledgehammer would violate the restrictions, as would hauling wood if done repetitively (as opposed to intermittently). Tr. 381. He said the same generally of building a raised planting bed or lifting ammunition boxes, if done repetitively as opposed to intermittently. Tr. 380, 382.[34] I find no reason to doubt that an ordinary manager in Gilliam's position watching a person wrapping a dry line onto a spool twenty-seven times or pumping a pallet jack forty-five times, both of which included a specific movement of his affected wrist with each repetition, could well conclude that the person was engaged in repetitious movement of his wrist, especially given the other repetitive activities.

Similarly, if even one of the ammunition boxes had weighed just 0.7 pounds more (*i.e.*, 50.1 pounds rather than 49.4), the Public Law Board would have had to find that Complainant in fact had not been complying with his medical restrictions; most likely, it would have upheld the discharge. But my task is not to determine whether, in fact, Complainant actually exceeded his restrictions. Rather, it is to determine whether I find credible that the involved Company officials believed that he did and discharged him for that reason, as opposed to asserting as true a rationale they knew to be false because they wished to retaliate against him for reporting an injury more than a year earlier after the Company had instead accommodated him for months.

I find only one fact that casts any doubt on the Company's *bona fides*. That is the testimony at Poff's disciplinary hearing that the heaviest ammunition box weighed 49.4 pounds. It is unknown whether Poff discussed that with anyone or whether Gilliam was present when that testimony was offered. Meriwether testified at trial that, although he reviewed the disciplinary hearing transcript, he did not recall noticing this testimony.

But I conclude that, even assuming that Company officials took the actual weight of the ammunition boxes into account, they reached their conclusions fairly, honestly, and reasonably. The videos were made on the three days that the investigator had any sight of Complainant. They were not three days selected from many recorded days only to show Complainant at his most active. They show Complainant doing more than "nothing major" and show him engaged in work requiring what a person could reasonably call repetitive wrist motion. That he was keeping within his lifting restriction by 0.6 pounds fails to address the other aspects of his activity. Put simply, an ordinary person who had the telephone conversation with Complainant that Gilliam had, who then viewed the surveillance video, could reasonably conclude that Complainant had been less than entirely honest in the phone call.

In all, I conclude that Complainant has failed to carry his burden to show that his reporting the workplace injury in May 2007 contributed to Union Pacific's discharging him from employment

[34] At trial, Dr. Abraham defined "repetitive" activities as repeating during more than 33 percent of any given hour. Tr. 385-86. He preferred to look at hour-long intervals rather than full day intervals because some activities might not last all day. *Id.* But he did not address activities that concluded in less than an hour even if Complainant was doing the same repetitive motion for the entire time. What would Dr. Abraham say of an activity that lasted 18 minutes, consisted entirely of a repeating wrist action, yet ended after those 18 minutes when Complainant went on to some other activity. Eighteen minutes is less that 33 percent of an hour, yet the activity would certainty appear to be repetitious. It thus is unclear what Dr. Abraham would say of Complainant's repeating the same wrist motion 27 times when he wrapped the dry line, but did this in less than one minute. Similarly, none of Complainant's other individual separate repeating motions continued for a full hour, although some lasted several minutes.

in September 2008. The separation in time between the protected activity and the discharge was too great to establish retaliation, and if anything, weighs against it. The Company fully accommodated Complainant's work restrictions for months after the injury, again suggesting the absence of any retaliatory purpose. Complainant's supervisor at the time he reported the injury supported the Company's accommodating Complainant and was discharged well before anything adverse happened to Complainant's employment. The transfer to the system job was a routine operation of a company function under the collective bargaining agreement to fill system level jobs with qualified workers who would get a pay increase by taking the job; it did not involve any of the people who later were involved in the discharge. Claims administrator Loomis was trying to develop evidence that would show Complainant as more capable to work than his doctors were reporting. But he did this as part of his work to defend the Company on a likely forthcoming Federal Employers Liability Act claim, and he passed on only accurate and honest information to the managers who later were involved in the discharge. The two central managers involved in the discharge decision were Meriwether and Gilliam. Neither worked in Complainant's management chain at the time he reported the injury in May 2007; neither was adversely affected when Complainant made the report. Although the accuracy their conclusion that Complainant was dishonest in the phone call with Gilliam might be subject to dispute for such reasons as the Public Law Board cited, a fair viewing of the surveillance video supports a conclusion that, more likely than not, Gilliam and then Meriwether reasonably concluded that he

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was dishonest when he said he was doing some "gardening, nothing major" and when he said he was complying with his medical restrictions.[35] And in any event, there is no persuasive evidence to link the discharge decision to Complainant's filing of the injury report in May 2007.

Conclusion and Order

For the foregoing reasons, Complainant's claim is DENIED and the case DISMISSED. Complainant shall take nothing by reason of his complaint.

SO ORDERED.

Digitally signed by STEVEN BERLIN
DN: CN=STEVEN BERLIN, OU=ADMIN LAW JUDGE, O=Office of Administrative Law Judges, L=San Francisco, S=CA, C=US
Location: San Francisco CA

STEVEN B. BERLIN
Administrative Law Judge

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

[35] It could be said that Complainant might not have been well-served either by his Union or by Dr. Abraham. If Complainant did not know that, without a loss of system seniority, he could have bid back onto the local district job, where he was being accommodated, as soon as the system gang sent him home, and if he never learned as much until after the discharge, one must wonder how the Union let that happen. Even without the factor that the system gang was not accommodating Complainant's medical restrictions, Complainant could have been back onto the local job once 90 days passed after the "forced recall."

One must also wonder how Dr. Abraham kept restricting Complainant and did not give him a full release to return to work when Complainant had no pre-existing hand or wrist problems, did not sustain a fracture or any other injury beyond a sprain or contusion, was reporting pain levels such as 1+ on a 1 to 10 point scale, and more than a year had passed since the injury. The inconsistencies between Dr. Abraham's progress notes and his status reports also complicated Complainant's return to employment.

Union Pacific certainly could have done better had it told Complainant that the system gang's decision that it could not accommodate him applied only to the system gang, not the local district gang that had been accommodating him. The letters from the system managers were on ordinary Union Pacific stationery without any indication that the manager writing was writing only about the system gang jobs. Depending on the fine points of the collective bargaining agreement, it might also have been possible for Loomis or some other manager to tell Complainant as soon as the system gang sent him home that he could bid back onto the district job without losing system seniority. But nothing about this suggests that the Company was retaliating; Complainant could have received the same information had he talked to his Union.

the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1982.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1982.110(a) and (b).