U.S. Department of Labor

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Issue Date: 22 November 2011

Case No.: 2010-FRS-00017

In the Matter of

HENRY PRICE,

Complainant,

v.

NORFOLK SOUTHERN RAILWAY CO.,

Respondent.

Appearances:

Ryan M. Furniss, Esquire
For the Complainant

Jill M. Lashay, Esquire
For the Respondent

BEFORE: ROBERT B. RAE
U. S. Administrative Law Judge

DECISION AND ORDER

This matter arises out of a claim filed by Complainant under the employee protection provisions of the Federal Rail Safety Act (FRSA), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L. No. 110-53 (July 25, 2007), and Section 419 of the Rail Safety Improvement Act of 2008 (RSIA), Pub. L. No. 110-432 (Oct. 16, 2008).

Complainant filed his complaint[1] with the Secretary of Labor on August 14, 2009, alleging that Respondent harassed and intimidated him in questioning about his prior work attendance record and previous work-related injuries during a meeting that occurred with a Superintendent on February 20, 2009. Following an investigation, the Secretary, acting through

[1] Although the Complainant did not actually file a complaint with the Secretary of Labor, his union representative evidently did. The effect is the same and the cause is properly before this Court.

her agent, the Area Director for the Occupational Safety and Health Administration (OSHA), found that there was no reasonable cause to believe that Respondent violated the FRSA. Specifically, the Secretary found that the evidence failed to support that Complainant suffered from an adverse employment action, nor did it support the existence of a connection between any alleged adverse employment action and any prior or prospective protected activity.

Complainant timely appealed this finding and the case was assigned to the undersigned on March 29, 2010. A *de novo* formal hearing in this matter was held in Kalamazoo, Michigan on August 19, 2010. All parties were present and the following exhibits were received into evidence: Joint Exhibits ("JX") 1 through14 and Respondent's Exhibits ("RX") 1, 2, 3, 5 and 6. Five witnesses, including the Complainant, testified at the hearing.

The parties were granted leave to file post hearing briefs. Respondent filed its brief on December 17, 2010. The Complainant filed "Complainant's Proposed Decision and Order" on December 21, 2010. The parties' briefs, the testimonial evidence and the documentary and medical evidence submitted at trial were considered in rendering this decision.

GOVERNING LAW

The Federal Railway Safety Act ("FRSA"), under which Mr. Price brings his claim, generally provides that a rail carrier may not retaliate against an employee for engaging in certain protected activity, including reporting a work-related injury or illness. *See* 49 U.S.C. § 20109(a).

The FRSA provides, in relevant part, that an officer or employee of a railroad carrier engaged in interstate commerce:

> …may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done…to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee.

49 U.S.C. § 20109(a)(4).

The 2008 amendments to the FRSA further provide that:

> A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician ….for purposes of this paragraph, the term "discipline" means charged against a person in a

> disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record.

Id. at § 20109(c)(2).

FRSA investigatory proceedings are governed by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 ("AIR 21"). 49 U.S.C. § 20109(d)(2).

AIR 21 prescribes different burdens of proof at different stages of the administrative process. At the adjudicatory stage:

> The Secretary may determine that a violation … has occurred only if the complainant demonstrates that any [protected activity] was a contributing factor in the unfavorable personnel action alleged in the complaint [and] Relief may not be ordered … if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

49 U.S.C. § 42121(b)(2)(B)(iii), (iv).

Under AIR 21, a complainant must establish by a preponderance of the evidence that he engaged in a protected activity that was a "contributing factor" motivating the respondent to take an adverse employment action against him. Thereafter, a respondent can only rebut a complainant's case by showing by clear and convincing evidence that it would have taken the same adverse action regardless of a complainant's protected action. *See Menefee v. Tandem Transportation Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 6 (ARB April 30, 2010) (citing *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13 (ARB Jan. 31, 2006)); *see also Thompson v. BAA Indianapolis LLC*, ALJ No. 2005-AIR-32 (ALJ Dec. 11, 2007) (Complainant must prove by a preponderance of the evidence that he engaged in protected activity, respondent knew of the protected activity, Complainant suffered an unfavorable personnel action, and protected activity was a contributing factor in the unfavorable decision, provided that the Complainant is not entitled to relief if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in any event).

An adverse employment action must actually affect the terms and conditions of a complainant's employment. *Johnson v. Nat'l Railroad Passenger Corp. (AMTRAK)*, ARB No.

09-142, ALJ No. 2009-FRS-6, slip op. at 3-4 (ARB Oct. 16, 2009); *See also Simpson United Parcel Service*, ARB No. 06-065, ALJ No. 2005-AIR-31 (ARB Mar. 14, 2008), *Agee v. ABF Freight Systems, Inc.*, ARB No. 04-155, ALJ No. 2004-STA-34, slip op. at 4 (ARB Nov. 30, 2005).

In order to meet his burden of proving a claim under the FRSA, Mr. Price must prove by a preponderance of the evidence that: (1) he engaged in protected activity, (2) NS knew of the protected activity, (3) he suffered an unfavorable personnel action, and (4) such protected activity was a contributing factor in the unfavorable decision. *Thompson v. BAA Indianapolis LLC*, ALJ No. 2005-AIR-32 (ALJ Dec. 11, 2007).

UNDISPUTED FINDINGS OF FACT

The parties, by their Joint Pre-Hearing Stipulation, agreed to the following undisputed facts:

1. Freight railroads typically operate in two-person crews consisting of a conductor and a locomotive engineer ("engineer").

2. The engineer, among other things, operates the locomotive's throttles, brakes and other devices that control movement.

3. The conductor, among other things, makes up or breaks up trains by builds the trains accordingly by coupling, uncoupling and "cutting" cars where and when needed and moving switches that designate the specific track over which a railroad car will travel.

4. Sometimes, the conductor is assisted by a third person, generally referred to as a brakeman or utility employee, to help make up or break up a train.

5. Norfolk Southern (NS) has a limited number of "hump yards", where part of the train building process is accomplished by pushing or shoving a railroad car up a hill or "hump" where gravity will then move it onto a designated track.

6. Trainmasters supervise the work of these freight railroad crews.

7. These train crews perform their work in railroad yards or "terminals" as well as enroute between terminals ("on the road") and. at customer locations.

8. At larger railroad terminals, NS employs a Terminal Superintendent to oversee all transportation functions at that terminal, including supervising the trainmasters.

9. Henry Price ("Price") has been employed in the railroad industry since 1973.

10. For purposes of collective bargaining under the Railway Labor Act and collective bargaining agreements, Price was represented during the relevant periods by the United Transportation

Union ("UTU").

11. Price resides in Constantine, Michigan, where he has been living since 1974.

12. Price began his employment in the railroad industry as a conductor for Penn Central, which was later acquired by Conrail.

13. Between 1974 and 1999, Price worked as a conductor at various locations in Indiana and Michigan, including as a conductor at the Elkhart, Indiana terminal.

14. In June of 1999, railroad carrier NS acquired major portions of Conrail, including the portion where Price had been working.

15. In conjunction with NS acquisition of relevant portions of Conrail, NS entered into collectively bargained implementing agreements with the UTU and other various labor unions where the parties agreed, among other things, on how to merge the seniority rights of the Conrail employees with the seniority rights of the NS employees ("Implementing Agreements")

16. On or about the effective date of said acquisition, Price became an employee of NS.

17. In or around 2005, Price voluntarily transferred to the Kalamazoo, Michigan terminal by making a seniority move in accordance with applicable collective bargaining agreements, including Implementing Agreements.

18. Price worked as a conductor at the Kalamazoo terminal from around 2005 to April 2009.

19. There was no permanent Trainmaster at the NS Kalamazoo terminal assigned to be there every day.

20. NS did send one Trainmaster to Kalamazoo regularly, but those Trainmasters who were sent to Kalamazoo also covered several areas of Michigan, including: Grand Rapids, Lansing, Kalamazoo, Battle Creek and down to the Indiana line.

21. The Federal Railroad Administration (FRA) was created by the Department of Transportation Act of 1966 (49 U.S.C. 103, Section 3(e)(1)). The purpose of FRA is to: promulgate and enforce rail safety regulations; administer railroad assistance programs; conduct research and development in support of improved railroad safety and national rail transportation policy; provide for the rehabilitation of Northeast Corridor rail passenger service; and consolidate government support of rail transportation activities.

22. The FRA reports that "because trains have long stopping distances, a small mistake in application of power or brakes by an engineer or the misreading or forgetting of a signal or a mandatory directive by any of the crew could have serious consequences. For example, such a small mistake could cause the train to run over a crew member, or to exceed its authorized speed and possibly derail or

collide with another train, with resulting injuries or death to train crews, passengers, or both, and possible harm to surrounding communities."

23. NS has published a number of safety rules and regulations.

24. General Regulation 38 (Job Briefings), states, in relevant part:

(a) A job briefing is communication between a group or by an individual (if on an independent assignment) to review:

Work to be performed

Potential exposures

Necessary safeguards for the task to be performed

Applicable rules and procedures

Tools, equipment, and materials needed

Weather conditions

Job location or work area

Work assignments - group or individual

25. Job briefings are conducted with conductors and brakeman during their workday.

26. If a situation on a job changes, a job briefing is usually held to discuss the changes.

27. NS also requires certain managers to engage in a one-on-one safety contact meeting with train crews annually.

28. One-on-one safety contacts are often conducted by Trainmasters, but can be conducted by a Terminal Superintendent or Assistant Terminal Superintendent.

29. Price engaged in one-on-one safety contact meetings while he was employed as a conductor in Kalamazoo.

30. When a new Trainmaster is assigned to a terminal, he will likely have one-on-one safety contact meetings with employees to get to know the employees and let them know where he stands on issues of safety.

31. As a conductor in Kalamazoo, Price had one-on-one safety contact meetings with new Trainmasters in order for the Trainmaster to meet Price.

32. In April 2009, NS sold its Kalamazoo and Grand Rapids lines to Grand Elk Railroad.

33. Price learned about the upcoming sale of the Kalamazoo terminal to Grand Elk Railroad in November 2008.

34. At the time NS sold the Kalamazoo line to Grand Elk, Price worked on the "local B-17" job.

35. At the time NS sold the Kalamazoo line to Grand Elk, Price had over 35 years of seniority.

36. After the sale of Kalamazoo to Grand Elk Railroad was announced, a meeting was held for UTU members in Jackson, Michigan.

37. Price attended the UTU meeting in Jackson, Michigan with other Kalamazoo union employees to discuss the sale.

38. At the time of the announcement, Price knew that he would exercise his seniority to work at the Elkhart, Indiana terminal since he had worked there in the past.

39. Price understood that a number of his UTU coworkers who were working in Elkhart were concerned about Kalamazoo employees exercising seniority after the Kalamazoo sale and displacing them.

40. Price met with Elkhart Superintendent, Terry Chapman ("Chapman"), on February 20, 2009 at the Elkhart terminal.

41. During Price's meeting with Chapman on February 20, 2009, Chapman told Price that his employees at Elkhart are like a family to him.

42. Chapman discussed prior work-related injuries that Price had suffered while working in the industry.

43. Price explained to Chapman that he was hit with a rock unexpectedly and went to the hospital to be examined.

44. Price did not remember Chapman asking him any other work-related injuries during his employment with NS or Conrail.

45. Chapman never advised Price that he could not transfer to the Elkhart terminal.

46. During the February 20, 2009 meeting, Price and Chapman discussed the fact that they both had spent time living in Georgia.

47. Price was not pleased with the meeting he had with Chapman and discussed this with his co-workers Brad Wilson and Mark Latva, who also met with Chapman on February 20, 2009.

48. Within a day or two following his meeting with Chapman, Price registered a complaint with his UTU representative, Scott Cole.

49. Priced was instructed by the Union to outline his complaint in a letter and provide it to the UTU.

50. Price followed the instructions provided by the UTU representative and prepared a letter outlining his complaint against Chapman.

51. UTU Local Chairman Scott Cole complained to NS about Chapman's treatment of Price and other employees.

52. Prior to the complaint, the UTU and NS were engaged in discussions over the issue of paying displaced Michigan employees to qualify on other NS rail lines.

53. Prior to the sale of the Kalamazoo and Grand Rapids lines to Grand Elk Railroad, the UTU and its Michigan members raised concerns that NS interpreted the collective bargaining agreement in a manner that did not require NS to pay wages to union members while they worked to qualify on new rail lines.

54. On or about March 2, 2009, NS agreed that Michigan employees displaced as a result of the 2009 sale of NS Michigan line would, for a limited time, be paid for qualification runs, provided that employees who were paid to qualify on lines at Elkhart would have to stay working on that line for at least 90 days or repay NS for "qualifying" wages they earned.

55. When Price transferred to the Elkhart terminal, he chose to qualify only on the Elkhart, Indiana to Bellevue, Ohio run.

56. Price was not required by NS to qualify on any runs at Elkhart, other than his chosen Elkhart to Bellevue run.

57. Price was fully paid at the appropriate rate for the time he spent qualifying on the Elkhart to Bellevue run.

58. The Elkhart terminal has a "hump yard" and is a main terminal.

59. There are numerous Trainmasters working the Elkhart Terminal.

60. Effective January 1, 2000, NS - with the agreement of the UTU - adopted the System Teamwork and Responsibility Training (START) policy.

61. The START policy, as amended, divides rule violations into three categories: minor; serious; and major.

62. In May 2009, Price received counseling from a Trainmaster within the Elkhart terminal for an alleged safety violation categorized as a minor violation ("START-Minor").

63. This was Price's only START-minor between May 2008 and May 2009.

64. Price did not grieve the issuance of the START-Minor.

65. Under the START policy, "[t]he first four minor offenses that occur within the rolling one-year period will be handled with counseling." Under START, if the employee feels he/she is innocent of the alleged offense, the employee may request a disciplinary hearing pursuant to the Collective Bargaining Agreement.

66. Receipt of only one START-Minor does not affect an employee's compensation or pension.

67. During the March 12, 2009 to July 6, 2009 period Price worked in Elkhart, he had no meetings with Chapman.

68. Price began working as a brakeman for Norfolk Southern in Battle Creek, Michigan on July 7, 2009.

69. Price did not find out that NS had positions available at the Battle Creek terminal until approximately two weeks after he began his work at the Elkhart terminal.

70. Although Price was eligible on July 7, 2009, pursuant to his UTU seniority to work a conductor position at the Battle Creek terminal, he chose to work as a brakeman.

CONTENTIONS OF THE PARTIES

I. Complainant's Contentions

Complainant never filed an actual closing argument brief but rather submitted a "Complainant's Proposed Decision and Order" for my consideration. Counsel for Complainant contends that the Respondent violated the Federal Rail Safety Act in a variety of ways. At the crux of the argument is the Complainant's characterization of the February 20, 2009 meeting between the Complainant and Mr. Terry Chapman, Superintendent of Elkhart Terminal. Mr. Chapman discussed, among other things found in the Complainant's service record, Mr. Price's previous injury reports from 1983, 1985 and 1992. More specifically, they discussed in detail the 1992 incident in which Mr. Price was hit by a rock thrown through the window of his train which was open due to the hot outside temperature. Counsel for Complainant argues this created a "chilling effect" on Complainant's willingness to report any injuries in the future and was a "reprimand" for the past reporting. Complainant characterized the discussion as "intimidating" and "felt threatened" by this discussion and the fact that Mr. Chapman was hitting a wire item in his hand and fidgeting with it throughout the meeting.

Additionally, Complainant alleges that he was "followed" by trainmasters while on his "qualifying" runs to Bellevue, Ohio and for some time afterwards. Complainant also felt he was being adversely affected by the number of conductors placed in the Elkhart to Bellevue labor pool (6 conductors and only 4 engineers in the pool). Lastly, Complainant contends he was forced to make another seniority transfer to Battle Creek, Michigan because he was "threatened, harassed and intimidated" as a result of the actions of Mr. Chapman and his "subordinate supervisors."

Complainant demands back pay in the amount of $4,004.00; extra mileage costs in the amount of $6,625.00; punitive damages in the amount of $50,000.00; and attorney's fees and costs.

II. **Respondent's Contention**

Counsel for the Respondent argues that there is no evidence to support Mr. Price's claim that he was subjected to any adverse employment action. Simply discussing the Complainant's history of injuries does not constitute adverse employment action under the law. Additionally, supervision of the Complainant's work; Complainant's voluntary transfer to Battle Creek; and the staffing of the conductor pool at Elkhart do not constitute adverse employment actions.

Respondent argues as well that the Complainant did not meet his *prima facie* burden of proving a causal connection between his "protected activity" (previous injury reports) and treatment by Mr. Chapman or NS. Respondent notes that Mr. Price's complaint contains no mention of the issuance of a START-minor as an adverse action. Price admitted he committed the violation and voluntarily accepted the agreement and so the counseling could not be "in retaliation" for his prior reports of injuries. Respondent also argued that Complainant failed to prove any causal connection between his earlier injury reports and the supervision of the trainmasters during his "qualifying" period or the injury reports and the conductor labor pool at Elkhart.

TESTIMONY

Ms. Catherine Lipp

Ms. Catherine Lipp is the Secretary Clerk to the Terminal Superintendent at Elkhart Railway Yard, Mr. Terry Chapman. She remembers the meeting between Mr. Chapman and the three men coming to Elkhart from Kalamazoo. She acknowledged that exercising seniority is a fairly common occurrence and that Mr. Chapman generally meets with every person who exercised their seniority to Elkhart. She was in her office when the meetings occurred. Her office is next to Mr. Chapman's office. The door to his office was closed during the meetings but she could hear voices on occasion when they got loud. She could not hear what was being said. She did not know who was in the meetings and was not sure if she heard elevated voices in all three of the meetings.

Mr. Henry Lauren Price – Hearing Testimony

Mr. Price testified that he hired out with the railroad on March 21, 1973. He had the position of a brakeman and first worked at Penn Central which later became Conrail. Conrail

was later acquired by Norfolk Southern (NS) in June 1999. He has been a conductor with NS since then. Mr. Price described the duties of his job as a conductor with NS. He stated that working on the railroad is a very dangerous job and one has to be alert and attentive at all times. His job was a union job. He had worked at Elkhart before in 1974 and bought a house so he could work at either Kalamazoo or Elkhart at his discretion. He exercised his seniority to move to Elkhart in 1974 and worked there for three or four months. He also worked there three or four different times over the years. He was aware they were going to lease the line in Kalamazoo and planned to exercise his seniority and move to Elkhart. He was informed of the meeting with Mr. Chapman on the day it happened. He had never had to meet with a Superintendent before and generally had met with a direct supervisor like a trainmaster in the past. A safety contact can be conducted by any supervisor. He went to the Elkhart hump yard for the meeting with Mr. Chapman and Mr. Latva and Mr. Wilson were also there to meet with Mr. Chapman. When he met with Mr. Chapman he was standing behind his desk and was standing up and sitting down during the meeting. Mr. Chapman was hitting a metal bar or something in his hands. Mr. Chapman told him he marked off too much and that he misses too much time. He talked about his work record and prior injuries. He questioned him about the rock throwing incident when he was hit in the head with a rock while riding on an engine. He had his window open because it was 90 degrees out and he didn't have any air conditioning then. Mr. Chapman said he needed to watch himself and he should have had his windows closed. The injury was in 1992. Mr. Chapman told him to follow the rules and work safe. Counsel asked if he felt "that he was reprimanding" him and he said he did and asked himself what this had to do with his coming to Elkhart. Mr. Chapman told him he would have to work safe and follow the rules. He also told him that if he faked an injury he would be all over him (expletive deleted). Mr. Price stated that this made him feel that he was telling him that if he got hurt he was going to lose his job so don't report anything. He felt it was a veiled threat. He felt that Mr. Chapman was telling him if he got injured he was going to be disciplined and fired. He marked up to qualify at Elkhart sometime after March 9, 2009. During the time he was qualifying he was "followed" by trainmasters and the Road Foreman. Mr. Latva, an engineer, was on a couple of the trips with him. He was qualifying with Vic Vida and Ed Unkafer, the regular crew on the train. After he qualified, a "carload" of trainmasters would come up on him as soon as he would get permission to tie on to the train. He felt it was very unnerving and stressful. On a qualifying trip to Bellevue the Road Foreman "bannered" them as they were coming out of the yard. We could see

him at different locations with a radar gun to see if we were violating any of the rules and he followed them almost all the way to Bellevue. It was the Road Foreman and another trainmaster by the name of Bryan. There were several people present during these times that the train was being observed. He qualified with those people and then made another trip with another crew but they were not followed that time to his recollection. The START violation he received was for walking between standing equipment and a locomotive without three step protection. It was given to him after his qualifying runs to Bellevue. Three point protection involves the engineer setting the brakes so the engine can't roll and then you can go between the cars to apply hand brakes or safety appliances. He did not obtain three point protection and did not see the person who reported him because there were boxcars on both sides. He does not believe there was any way they could have observed him violating the three point protection but he admitted that he actually did violate the three point protection. He has never been disciplined in his career. He stayed in Elkhart for another month and a half to satisfy the 90 day requirement so he would not have to repay the qualifying money. He left Elkhart because of the stress and because he didn't like the environment where he was being followed constantly. He marked off between 7 to 9 days because he was stressed out. He stated that he believed he wasn't very welcome at Elkhart and that was the reason he left. He went to Battle Creek which is about 25 miles more each way from his home than going to Elkhart. He was in a road switcher job at Battle Creek. The Battle Creek job is less desirable than the Elkhart job as to workload. The wages are about the same.

He is a member of the United Transportation Union and has 36 years seniority. He could have gone to any of a number of other terminals because of his seniority. Generally you get three to five qualifying runs before you go on your own. A trainmaster would be the person who determined he was qualified. When he felt he was qualified he just called up the trainmaster and he said "cool." They wanted him to qualify in other areas and work on the extras list but he refused because of his seniority. A one on one safety contact meeting is when your supervisor comes up and talks to you about safety and how you are doing. This are required at least once annually. His supervisor at Kalamazoo, Bruce Bonds, had a one on one safety meeting with him and discussed his service record and told him to work safe and follow the rules. He also discussed safety issues with him. The union official scheduled the meeting with Mr. Chapman for February 20, 2009. Mr. Chapman showed up late for the 2:00 p.m. meeting. He told Mr. Chapman he had seniority and informed him how much money he made in Kalamazoo. Mr. Chapman spoke to him about his attendance and they both discussed having lived in Georgia.

Mr. Chapman never prevented him from holding a position in Elkhart. He stated that he "took it that" he was not allowed to report an injury even though Mr. Chapman never said he was not allowed to report an injury. Mr. Chapman said that if he (Mr. Price) experienced an injury he would take care of it. The START-minor was not issued by Mr. Chapman. After the February 20th meeting with Mr. Chapman he was upset and spoke to his union local chairman and was advised to write a letter summarizing the complaint. He assumed the letter would be forwarded to the EEOC. He never contacted the Department of Labor himself.

None of the previous one on one contacts discussed prior injuries. They had six conductors in the Bellevue pool and only four engineers and within a week of his moving to Battle Creek, they were down to four conductors.

Part of the reason he went to Battle Creek was because he felt he wasn't making enough money in Elkhart. The union controls the conductor pool at Elkhart.

Mr. Henry Lauren Price – Deposition Testimony

Mr. Price testified at a deposition held on May 5, 2010. He stated that when he went to Battle Creek he didn't know the work well there and so he started working as a brakeman instead of a conductor. He did it on his own and he prefers to be a brakeman now. There was no job available in Battle Creek when the takeover happened. It opened up a few weeks after he marked up to Elkhart. He stayed in Elkhart for 90 days so he would not have to pay back the money he was paid to qualify. A bulletin from Norfolk Southern said they had to meet with an official and they tried to set up a meeting with the superintendent at Elkhart. They went through the union to set up the meeting. He had hoped he would be treated cordially at Elkhart. He was going through a traumatic time of his life with his job being taken from him. Mr. Chapman started yelling at him saying that he missed too much time. He said they were not going to stand for that. He was hitting his palm with a metal bar. It was about one and a half feet long. Mr. Chapman was standing and sitting behind his desk and then used the computer to check Mr. Price's 2008 wages. He said "I didn't want you Kalamazoo guys here, you've got an axe to grind but I'm stuck with you." He said he was putting one of Mr. Chapman's "family" on the street. He told him that if he got hurt on Norfolk Southern Railroad "we will take care of you but if you fake an injury" he would "be all over his ass." Mr. Chapman then asked him why he hadn't gone to Grand Elk to work. He told Mr. Chapman he would have had to give up 36 years of seniority, take a big pay cut and give up 8 weeks of vacation if he went there. He said that from the moment he walked into the office, he was "Pearl Harbored" by Mr. Chapman. He had

no idea this was how he would be treated. He was totally shocked by the whole experience and had never been talked to by a supervisor that way before. He did not like to be threatened.

Brakemen do not have to qualify. He said "every night I got followed by the trainmasters in the yard – a carload of them, about three, every night." It took about two weeks to qualify. He doesn't know who the trainmasters were. He stated that "They try to get as many "Starts" on you as possible." After that, they left him alone. He said it was kind of nice the last month not being tailed all the time. He felt he was disciplined by the Start. He stated that they were "starving him out in that pool." Victoria Bronson was also transferred to Elkhart as a conductor and she also worked on the Elkhart to Bellevue line. She was a lot less seniority than he did, maybe 8 or 9 years. She had a very cordial meeting with Mr. Chapman. She said he was "super nice."

Mr. Gerald DeLacey (Terry) Chapman

Mr. Chapman testified that he had been with the railroad for 34 years and was the Terminal Superintendent at Elkhart. His job is to oversee the safety, efficiency and operations of the yard. He has been in that job since 2006. He was not aware of who originally requested the meeting with Mr. Price. It is typically his job to have a meeting for a one on one contact or safety contact. He wrote the memo after being notified of the EEO Complaint filed by Mr. Price. He was never disciplined for his conduct in the meeting. He saw Mr. Wilson first, then Mr. Latva and then Mr. Price. He reviewed the employees work records before the meeting. He spoke to each of the men about their previous injuries. When Mr. Price came in they introduced themselves and then he talked about Mr. Price's work record and that he needed to "mark himself off." He had a piece of wire about ten inches long in his hand. The item was double looped with a small (quarter sized) porcelain cone at the bottom. He had picked it up in the rail yard because he didn't want anybody to trip on it and just had it in his hand. He was fidgeting with it and was tapping it in his hand. He does not recall ever hitting the desk with the item. He doesn't recall talking to Mr. Price in an elevated voice. He does remember speaking to Mr. Latva in an elevated voice. His recollection is that he did not speak to Mr. Price in an elevated voice. He does not get any bonus or commendation for having fewer injuries reported. The bonuses are based on financial figures in operations and they may give you a plaque if your territory goes uninjured. His incentive is to keep them from getting injured. He discussed the 1992 injury with Mr. Price and said he should have closed the window. He did not say it in any agitated way. He spoke about Mr. Price's work record and said that he believed he needed to

improve his work record. He told his trainmasters and Road Foreman that there were going to be people marking up. He was trained on how to have one on one contact meetings. The memorandum by Mr. Mannion, COO, summarizes that training. It is acceptable for a supervisor to discuss a prior injury.

He calls the tapping or fidgeting the "Terminal Tower Syndrome" and it is just nerves working. He pulled up Mr. Price's safety record to see what it looked like. He wanted to discuss any incidents he had and figure out what happened and how it might be prevented and maybe help somebody down the line. Mr. Price had a long time since any injury and that was commendable. He wanted to know what happened and maybe learn how they could prevent it from happening in the future. The one on one safety contacts are designed as a contact between a supervisor and an employee to be able to sit down and talk, get to know each other and discuss incidents and get a commitment for safety. Each employee is required to have an annual one on one. When Mr. Price first came into his office, he asked if he had his annual one on one. Mr. Price said no and so Mr. Chapman felt it was a good opportunity to do the annual one on one. He asked Mr. Price a couple of questions about the rock incident. He also spoke to him about his marking up. He has always asked employees just to mark up when the permitted absence is over. If given permission to be off, you are required to mark up at the end of that permission time and then the employee can mark himself up on the computer or call the crew center in Atlanta and mark up. It is a policy of Norfolk Southern that if an employee is off with permission of a supervisor that they notify Norfolk Southern of their availability to work and mark up. Looking at Mr. Price's work record showed he was off without permission. Mr. Price said that he didn't realize he had to mark himself up. Mr. Chapman believed the issue was discussed and resolved. The trainmasters at the Elkhart yard report to him but the road trainmasters do not report to him. The Elkhart trainmasters handle the Elkhart hump yard which is about five and a half miles of territory. The road trainmasters take care of the road district, such as from Elkhart to Chicago, Toledo or Bellevue. He stated he has never told an employee not to report an injury and he never instructed the trainmasters to harass Mr. Price. He did not direct that the START be issued to Mr. Price and he had no control over the conductor pool at Elkhart. He doesn't recall ever seeing Mr. Price after the meeting on February 2009.

On re-direct, Mr. Chapman said he was not upset about anyone coming to Elkhart. He remembers a discussion with Mr. Price about marking up after half days off but not about weekends. He did not send the trainmasters to observe him. He didn't know he was qualifying

on the Bellevue line. He didn't know where he was going after the meeting. He assumed he was going that way but never saw him do it. The trainmasters are required to make safety and operating group checks and hopefully there is always somebody out there doing the checks.

We talked about possibly keeping the windows closed to prevent that kind of thing from happening but not just in dangerous areas.

Mr. Mark D. Latva

Mr. Latva stated that he has been an employee of Norfolk Southern since April 18, 1978. He has been a locomotive fireman and locomotive engineer at numerous different rail yards. He explained what his different jobs entailed. He knew the line was going to be leased out and that he was going to have to relocate. He knew he would mark up to Elkhart yard. He had worked there from 1988 to 1999 and had friends that worked there. It was also the closest terminal to his house. He was advised by the MFNS memo system that they had to have a meeting with a supervisor of that terminal before they would be able to mark up there if they hadn't worked there within the last six months. He described the meeting with Mr. Chapman as hostile because of his display of anger and his attitude. He was holding some type of metal object, like a part of a broken golf club. He would lean back in his chair and talk to him and he would be smacking it into his left hand while holding it in his right. This made him feel very intimidated. He marked up to Elkhart in March 2009. He contacted the road foreman and then had to qualify in Elkhart. He was with Mr. Price on the qualification runs. Mr. Alan (Sherman), the road foreman of engines, and the trainmaster from Bryant, Ohio followed them around. He went to lunch with Mr. Price after their meetings with Mr. Chapman and talked about how similar their meetings were.

Mr. Aaron Patrick Sherman

Mr. Sherman stated he had worked for Norfolk Southern for 13 years and is the Division Road Foreman of Engines. He supervises the certification and annual monitoring of all the locomotive engineers in the Dearborn Division. Previously he had worked as the Assistant Terminal Supervisor in Chicago. He described the organization of Norfolk Southern Railroad. He is responsible for dealing with safety issues and it is part of his responsibility to observe crew actions while operating trains. The first item of the Core Values is to put safety first. They have rules and safety quality workshops throughout the year. He discussed the need for one on one safety briefings with new employees annually and if someone is away from the job for an extended period of time. He stated there were: START minor, serious and major. A START

minor does not result in any disciplinary action. If a person has three repetitive actions within one year it could go to serious. Nothing happens if an employee is compliant. The START is documented but not considered for future incidents. If an employee objects to the START then they go through a formal industrial hearing. The START is a joint agreement between the employer and the employee. He described what it means to "qualify" on a line. He stated that depending on the type of job an employee is qualifying for he may be under constant supervision or have little or no supervision while qualifying. It is the trainmaster's or road foreman's responsibility to oversee and supervise during the qualifying period. Using radar guns is part of the required efficiency checks. They have several categories to monitor and could also download the event recorder to check on the personnel qualifying. Employees like locomotive engineers are tested every 90 days on that particular event. The checks are randomly done. Mr. Sherman described the difference in size between the Kalamazoo yard and the Elkhart terminal. In 2008 and 2009, they weren't running as many trains due to the downturn in business and that impacted on the pools. The union was given the task to regulate the pools which were reviewed every 15 days by the union chairman.

The START stays in the employee's permanent record. The terminal trainmasters are responsible for the terminal and the road trainmasters could have several hundred miles to supervise. The Elkhart Terminal Superintendent does not have supervisory authority over the trainmasters in other areas.

DOCUMENTARY EVIDENCE

The following Joint Exhibits were admitted and considered:

1. Norfolk Southern Safety Bulletins
2. Abbreviated Employee Profile for Henry L. Price/Employee Record
3. Employee abbreviated Profile/Employee History Inquiry
4. June 9, 1995 "Persistent and Unsafe Practices" Letter
5. NS Internal Control Plan, effective date: January 1, 1997
6. Employee History Inquiry for H. L. Price
7. NS System Routes Map
8. Accident/Incident Reporting Policy and Complain Procedures
9. Letter dated Nov 16, 2007 from Mark Mannion re one-on-one conversations
10. Email dated Feb 23, 2009 from Terry Chapman
11. START- Alternative Handling Report dated April 25, 2009

12. Letter to Scott Cole from Henry L. Price dated Feb 20, 2009

13. Letter to Scott Cole from B. D. Wilson dated Feb 20, 2009

14. Letter to Scott Cole from Mark D. Latva dated Feb 20, 2009

The following Respondent (NS) Exhibits were admitted and considered:

1. Notice of employment opportunities for the Grand Elk Railroad

2. Nov 6, 2008 letter from S. R. Weaver re Grand Elk RR

3. March 2, 2008 letter from C. M. Irvin re pending lease of Michigan Lines

5. NS Thoroughbred Code of Ethics

6. Deposition of Henry L. Price taken on May 5, 2010

ADDITIONAL FINDINGS OF FACT

1. A "seniority move" is when a member of the UTU uses his or her years of service with the railroad to bump another UTU employee of lesser seniority from a position within the same seniority division.

2. Trainmasters' duties include ensuring that safety rules are being observed at all times.

3. One-on-one safety contacts involve meeting with an employee to talk about safety events, career service records and any past rules infractions and how to prevent them in the future.

4. One-on-one contact meetings also offer management an opportunity to inform a new or returning employee of expectations in the job.

5. Chapman served as the Terminal Superintendent of Elkhart Terminal at all times relevant.

6. As Terminal Superintendent, Chapman was assigned to oversee the safety and efficiency of the operations at the Elkhart Terminal.

7. As Terminal Superintendent, Chapman supervised the Trainmasters within the terminal yard, who in turn were responsible for all transportation operations within the Elkhart yard.

8. Chapman did not supervise the Road Trainmasters who were responsible for transportation operations for trains that had departed Elkhart or that were traveling to Elkhart.

9. Chapman typically met with employees who were exercising seniority to work at the Elkhart Terminal.

10. Chapman would also have a one-on-one safety contact with new employees moving into the Elkhart terminal if the employee had not had his annual contact meeting.

11. Prior to meetings with employees transferring into Elkhart, Chapman reviewed their work history and safety records.

12. Chapman received the work history and safety records for Mr. Price, as well as two other employees from Kalamazoo who were meeting with Chapman on the same day.

13. In preparing for the February 20th meeting, Chapman looked at Price's work history records, which included notations of injuries reported on 12/04/83, 6/12/85 and 5/18/92.

14. Chapman told Price he would have to "work safe, follow the rules."

15. Chapman told Price that if he got injured on the job he would take care of him, but Price should not "fake any injuries" while he worked at Elkhart or Chapman "would be all over his ass."

16. Chapman never threatened Price or told him not to report an injury.

17. Price said he "felt like" what was being said was a "veiled threat."

18. Chapman discussed Price's earlier injuries because he wanted to make sure Price learned from those incidents and was taking precautions to avoid similar incidents in the future.

20. Elkhart terminal is very different than the Kalamazoo terminal where Price had been working for the previous several years. Elkhart is the largest classification yard in the NS System.

21. In addition to discussing safety, Chapman instructed Price that he is required to notify NS when he is available to work at the end of any time off, *i.e.*, "mark up" to come back.

22. Chapman also discussed Price's career seniority record

23. Chapman was hitting or tapping a piece of wire into the palm of his hand while speaking to Price.

24. "Qualifying" required the employee to ride along with the regular crew approximately five times to learn the territory and the track.

25. Employees working on runs out of the terminal must be "qualified" to ensure that they are familiar with the nuances of the line.

26. Within approximately 30 days after his meeting with Chapman, Price made a move to the Elkhart to Bellevue Ohio line of road assignment.

27. Price's seniority allowed him to refuse to work any road assignment other than the one(s) he chose.

28. Chapman did not know where Price went to work after the February 20, 2009 meeting and he did not know Price was qualifying on the Elkhart to Bellevue line

29. Because of Price's seniority, he was not required by NS to qualify on any runs at Elkhart other than his chosen Elkhart to Bellevue run.

30. The Elkhart to Bellevue, Ohio line of road assignment fell outside of the work supervised by Chapman as the Elkhart Terminal Superintendent.

31. For the first week or two at Elkhart, Price went on qualification rides with other "qualifying" personnel and the regular train crews who were familiar with the Elkhart to Bellevue, Ohio line of road.

32. During one or more of these qualification train rides, Price noticed Trainmasters observing the actions of the train crews.

33. The Elkhart to Bellevue territory had several more Trainmasters supervising operations than the Kalamazoo terminal.

34. The duties of trainmasters include watching train crews performing their jobs and periodic and random observations on a regular basis.

35. As a part of required efficiency checks, supervisors often monitor activities along the train lines, using radar guns and other observational devices.

36. These checks are done randomly

37. Engineers are tested every 90 days and intermodal trains (*i.e.*, those for which NS has a specific service commitment) are often followed to insure that the train does not have issues along the way.

38. The Elkhart terminal is a major classification yard and is the largest in the NS System.

39. The Kalamazoo-Terminal operations were different in many ways from the work performed at Elkhart.

40. The Elkhart Terminal manages approximately 100 trains per day through the Terminal, compared to 20 trains per day at Kalamazoo.

41. After Price completed his qualification runs, he was assigned as a regular member of the pool of conductors who served on trains hauling freight over the Elkhart to Bellevue line of road.

42. On April 26, 2009, Price violated a NS safety rule regarding "3 points of contact" or "three point protection."

43. Pursuant to the June 1, 2000 agreement with the UTU adopting an alternative discipline system focused on training and counseling, known as the System Teamwork and Responsibility Training policy (START), Price received counseling from a Trainmaster on or about April 26, 2009 for this safety rule infraction, which START categorized as a minor violation ("START-Minor").

44. Chapman did not issue the START-Minor or instruct anyone to issue the START.

45. Chapman was never advised of the START-Minor which Price accepted.

46. The START policy, as amended, divides rule violations into three categories: minor; serious; and major.

47. Under START, if an employee feels he is innocent of the alleged offense, he does not have to accept the START form and may request a formal industrial hearing pursuant to the Collective Bargaining Agreement.

48. Price accepted the START-Minor counseling and admitted his mistake.

49. Receipt of only one START-Minor does not affect an employee's compensation or pension and cannot be considered by management for purposes of START progressive discipline after the passage of one year from the date the START-Minor is issued, despite the fact that such record remains in an employee's work history record.

50. This was Price's only START-Minor between May 2008 and May 2009.

51. During the March 12, 2009 to July 6, 2009 period Price worked in Elkhart, he had no meetings with Chapman.

52. Chapman never suspended Price.

53. Chapman never placed Price on probation.

54. Chapman never demoted Price.

55. Chapman never discharged or attempted to discharge Price.

56. Chapman never reprimanded Price.

57. Chapman never forced Price to move to another terminal.

58. On July 7, 2009, Price voluntarily made a seniority move to the Battle Creek, Michigan Terminal.

59. Price believed that he was not getting enough work as a conductor in the pool for the Elkhart to Bellevue run.

60. The Elkhart to Bellevue pool had 4 engineers and 6 conductors, which resulted in the conductors not working as frequently as the engineers.

61. Chapman did not control the number of conductors in the pool but the Union did.

62. The applicable collective bargaining agreement between NS and UTU dictates how many conductors will be in a given pool and gives the UTU the right and ability to enlarge or shrink a pool based upon the volume of work at a given time.

63. On July 7, 2009, pursuant to his UTU seniority, Price transferred to a position as a brakeman at the Battle Creek terminal, where he could work more frequently and make about the same money.

DISCUSSION

Complainant alleges that Respondent violated 49 U.S.C. § 20109(a)(4), which provides:

> A railroad carrier engaged in interstate or foreign commerce, a contractor or subcontractor or such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done …
>
> (4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee…

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

The term "demonstrate," as used in AIR 21 and FRSA, means to prove by a preponderance of the evidence." Thus, Complainant bears the burden of proving his case by a preponderance of the evidence. If Complainant establishes that Respondent violated the FRSA, Respondent may avoid liability only if it can prove by "clear and convincing evidence" that it

would have taken the same unfavorable personnel action in the absence of Complainant's behavior. *See* 49 U.S.C. §§ 20109(d)(2)(A)(i); 42121(b)(2)(B)(iii)(iv).

1. Employer Subject to the Act and Employee a Covered Employee

Norfolk Southern Railway Company (NS) is subject to the Act and Mr. Price is a covered employee under the Act.

2. Protected Activity

By its terms, FRSA defines protected activities to include acts done "to notify, or attempt to notify, the railroad carrier or Secretary of Transportation of a work-related personal injury or work-related illness of an employee.**"**

Although Mr. Price engaged in protected activity when he reported work-related injuries to his employer in 1983, 1985 and 1992, there is no evidence to support his argument that he was engaged in any such protected activity during the period in question.

Complainant's argument about the "chilling effect" to reporting future injuries arising from the discussions during the February 20, 2009 meeting between Mr. Price and Mr. Chapman about one or more previously reported and remote injuries is speculative at best. The Court cannot engage in speculation about what might or might not happen at some future time and must be limited to the actual facts in evidence. Mr. Chapman's direction not "to fake an injury" cannot logically be construed as a threat not to report an actual injury or be fired as Mr. Price interpreted.

It is reasonable to discuss safety issues and potential or real injuries in light of the fact that work on the railroad is a dangerous job, as attested to by all the witnesses and common sense. I took judicial notice of the fact during the hearing as well. Such discussions are also clearly not prohibited by the company's rules, codes or regulations.

Chapman's discussion with Price regarding his prior reports of injuries and Chapman's instructions regarding future reports are not prohibited by the FRSA. Chapman had a legitimate, reason for discussing Price's prior injuries and that was as a "lessons learned" approach to preventing future injuries. It is a reasonable topic to discuss during a safety contact meeting or at any meeting between employee and supervisor. I find the explanations and testimony of both Mr. Chapman and Mr. Sherman credible as to the necessity for safety inspections, observations and one on one contact meetings.

The circumstances surrounding the meeting in Mr. Chapman's office were less than optimal for a congenial discussion between the participants. Mr. Price was undergoing, as he

characterized it, a "traumatic time" in his life by facing the difficult decision of determining where he was going to move after the sale of the Kalamazoo line by Norfolk Southern. He was going from a small yard with little supervision to the largest terminal in the system with a great deal more supervision. Mr. Chapman had to deal with the personnel changes that come with senior personnel moving onto a site and displacing others of less seniority. He showed up late for the meetings without the courtesy of an explanation, getting things off on a bad foot. It is clear from the testimony and the documentary evidence that both of them had rather poor attitudes going into the meeting and worse coming out. The climate was ripe for rancor, disagreements and hard feelings. What was essentially a personnel matter which had no possibility of arriving at any "good" results became a worse situation after mutual escalation of the problems. Tempers flared, harsh words were spoken and feelings were hurt in this "no win" situation.[2]

Mr. Price says he felt threatened by Mr. Chapman's words and actions, particularly his "fidgeting" with the wire item variously described throughout the evidence. There is certainly little doubt that Mr. Chapman will ever win a "Congeniality Award" and suffered from a case of bad judgment in using a "wire" to satisfy his fidgeting urge during the meetings. Had Mr. Chapman used the pencil he said he usually uses, perhaps the meetings would have gone just a bit more smoothly, but that is doubtful. Mr. Chapman never approached Mr. Price in a menacing manner; he never "pointed" the item at Mr. Price in a threatening manner; and he suspended "tapping" when he used his computer to verify Mr. Price's previous year's wages. The "talking to" by Mr. Chapman was not a reprimand as defined by the Act, nor can it reasonably be called threatening. The posturing of both men made the situation more difficult than it had to be.

I find that the Complainant has not met his burden to prove by a preponderance of the evidence that the activity he was engaged in was a "protected activity." Mr. Chapman did not discharge, demote, suspend, reprimand or discriminate against the Complainant as defined in the Act. Mr. Price did not notify or attempt to notify the carrier or the Secretary of a work-related personal injury or work-related illness. Simply alleging that an injury might occur at some future time and Mr. Chapman might tell him not to report such injury is too speculative and too subjective to consider. The term "discipline" means making charges against a person in a disciplinary proceeding, suspend, terminate, place on probation or make notes of reprimand on

[2] I note with some curiosity that the meeting between Mr. Chapman and Victoria Bronson, discussed in Mr. Price's deposition, went much better for some reason and she found her meeting very congenial and that Mr. Chapman was very nice to her.

an employee's record. None of this happened either during the February 20, 2009 meeting or thereafter while Mr. Price was working at Elkhart.

3. Employer Knowledge

Generally, it is not sufficient for a complainant to show that his or her employer, as an entity, was aware of his or her protected activity. Rather, the complainant must establish that the decision makers who subjected him to the alleged adverse actions were aware of his protected activity. *See Gary v. Chautauqua Airlines,* ARB Case No. 04-112, ALJ No. 2003-AIR-38 (ARB Jan 31, 2006).

For the purposes of this decision, it is clear that Complainant considered Mr. Chapman, Terminal Superintendent, as the person who subjected him to all the alleged "adverse actions." Mr. Price has alleged that Mr. Chapman "threatened" him by discussing his past injuries thereby making him concerned that if he ever had an injury and reported it he would be disciplined and fired; that Mr. Chapman was behind the trainmasters following him for a part of the time he was at Elkhart which "stressed him out" to the point he had to take several days off; that Mr. Chapman was somehow behind the issuance of the START-minor in May 2009 and that this was a "reprimand" in Mr. Price's opinion; that Mr. Chapman was somehow involved in rigging the conductor pool against him and thereby "starving" him; and that Mr. Chapman was responsible for him leaving Elkhart and making a seniority move to Battle Creek, Michigan, which is farther from his home.

I find no merit to any of these allegations. However, *assuming arguendo* there had been any adverse personnel action, the Employer would certainly have had the requisite "knowledge."

4. Adverse Personnel Action

Regardless of Price's subjective feelings about the meeting he had with Chapman on February 20, 2009 (*i.e.*, that he found Chapman's tone of voice, body language, gestures and demeanor to be threatening), such conduct does not constitute an adverse action because it did not actually affect the terms and conditions of Price's employment. *See Johnson v. Nat'l Railroad Passenger Corp. (AMTRAK),* ARB No. 09-142, ALJ No. 2009-FRS-6, slip op. at 3-4 (ARB Oct. 16, 2009)(adverse action must have an actual affect on the Complainant's employment); *Hirst v. Southeast Airlines, Inc.,* ARB No. 04-116, ALJ No. 2003-AIR-47, Slip Op. at 9 (ARB Jan. 31, 2007) (not every action taken by an employer that renders an employee unhappy constitutes an adverse employment action; the employee protections that DOL administers are not "general civility codes"); *Melton v. Yellow Transp., Inc.,* ARB No. 06-052,

ALJ No. 2005-STA-2, Slip Op. at 23 (ARB Sept. 30, 2008) (a sharply worded letter of warning was not an actionable adverse action). *Accord Hyland v. American International Group,* No. 08-4203, slip. op. at 4 (3d Cir. Jan. 12, 2010) ("it would be unfortunate if the courts forced the adoption of an employment culture that required everyone in the structure to be careful so that every stray remark made every day passes the employment equivalent of being politically correct, lest it be used later against the employer in litigation").

Strict supervision of Price by Trainmasters in the Elkhart Terminal is also not an adverse action and supervision of a subordinate's work, without more, does not adversely affect the terms and conditions of that employee's employment. *See McKinnon v. Gonzalez,* 2009 WL 2338381, at 9 (D. N.J. July 24, 2009) (being supervised is not adverse employment action). Mr. Sherman, Mr. Chapman and even Mr. Price stressed how important safety is in the railroad industry. Each acknowledged that the trainmasters were obligated to observe employees during the performance of their jobs and particularly during their "qualifying" runs. Mr. Price was "observed" along with Mr. Latva (as a qualifying engineer on the same line) during his qualifying runs and for some period of time thereafter. However, Mr. Price testified that he was not followed for at least the last month he worked at Elkhart out of the total of three months (90 days). Whether he liked the observations or not is irrelevant. As an employee he was subject to such supervision and observation in order for the railroad to maintain the high standards of safety that each person testified to during the hearing. The trainmasters are tasked with doing exactly what they did and Mr. Price suffered no ill effects from their actions. His stating that he was "stressed out" and had to take some days off is insufficient to prove that something ill happened to him because of Mr. Chapman's actions. There was no medical evidence to support this vague and self-serving statement. Also, there is no evidence of any nexus between the "observations" by the trainmasters and Mr. Chapman.

Although Price did receive a written START-Minor for his failure to comply with a NS safety rule, issuance of such a form is not an adverse action because Price did not suffer any "discipline" as that term is narrowly defined within the FRSA. *See* 19 U.S.C. § 20109(c)(2). Mr. Price agreed to accept the START instead of contesting it in a formal industrial hearing. Although the START-minor remains in his record, in order to be "disciplined" Mr. Price would need at least three START-minors within one year, which is not the situation in this case. He also freely admitted that he actually had violated the safety rule but felt that whoever wrote him up could not have seen him when he was in the process of violating the rule. This is a hollow,

self-serving complaint and an attempt to somehow shift the blame for the infraction on those who reported him and properly held him accountable. Mr. Price made a great effort to emphasize how dangerous the work was and then attempted to somehow avoid accepting full blame by saying no one really saw him do exactly what he did. His allegation is not supported by the evidence and the START-minor is not an adverse action as defined by the Act.

Additionally, since Mr. Price's Complaint contained no mention whatsoever of the issuance of the START-Minor as an adverse action, it would not be properly before this Court. However, I have considered this in the alternative and if the issue were properly before me I would rule that such activity is not an "adverse personnel action."

Respondent argues that The Railway Labor Act ("RLA") bars me from interpreting the Collective Bargaining Agreement between NS and the UTU. *See Lingle v. Norge,* 486 U.S. 399; *see also Brown v. Ill. Cent. R.R. Co.*, 254 F.3d 654, 668 (7th Cir. 2001) ("A claim brought under an independent federal statute is precluded by the RLA if it can be dispositively resolved through an interpretation of a CBA); *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 220 (1985) (state tort claim for bad faith handling of insurance claim for benefits under CBA's disability plan was preempted by § 301 because the right at issue was "rooted in contract" and interpreting such contract would subject the union and the employer to "varying interpretations" which is in violation of the "congressional goal of a unified federal body of labor-contract law"). I agree and certainly do not desire to begin to attempt to interpret such agreements. This bargaining agreement would be critical in deciding Mr. Price's allegation about NS and Mr. Chapman "starving" him in some undefined manner by having six conductors in the conductor work pool while there only four engineers in the engineer pool. There is more than sufficient evidence to show that the union was in charge of setting up and monitoring the employee pools on a regular basis. The evidence also shows that the composition of the pools was dependent on the work to be done at the yard. Mr. Price's argument that the pool dropped to four after he left is not persuasive of a conspiracy to deprive him of his livelihood. I find there is also no proven nexus between any actions of Mr. Chapman or NS in collusion with the union to so affect Mr. Price.

Price also fails to meet his burden of proving that he suffered the adverse employment action of constructive discharge from Elkhart or involuntary transfer to Battle Creek, Michigan because the facts of record clearly reveal that Price voluntarily and willingly transferred to Battle Creek in pursuit of increased compensation. He testified that he "did it on his own" and that he liked being a brakeman better than being a conductor in Battle Creek. His last month at Elkhart

went without any incident and he was not followed and yet he chose to move to Battle Creek. While he may not have "felt welcome" in Elkhart, that is not sufficient evidence to sustain his burden of proof.

Even if one or more events had constituted an adverse employment action, Price's "protected activity" (having reported injuries in previous years) was not a contributing factor to any action and the same action would have been taken in the absence of that behavior.

I have considered that Complainant alleged that Mr. Chapman had a history of intimidating employees. I ruled that additional proffered "evidence" was not relevant to the particular facts of this case and any additional "character" evidence would only be more prejudicial than probative and would result in digression to non-relevant issues which would confuse the record and this trier of fact. *See* 29 C.F.R. § 18.403 (although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger or confusion of issues, or misleading the judge as trier of fact); s*ee also Becker v. ARCO Chemical Co.*, 207 F.3d at 191 (evidence of prior bad acts is only probative if "'the proponent … clearly articulate[s] how...[the] evidence fits into a chain of logical inferences, no link of which may be the inference that the defendant has the propensity...'"). Counsel for Complainant was on a fishing expedition in an attempt to paint Mr. Chapman in the most ungracious light possible. While Mr. Chapman did not win any awards for his judgment in handling a difficult personnel interview, his actions were not the cause of Mr. Price's list of woes.

Respondent also argued that Price's allegations that Respondent violated the FRSA because Chapman failed to follow the NS Code of Ethics -- regarding treating employees with respect and properly conducting a safety meeting -- should not be considered since "it is inappropriate for the judiciary to substitute its judgment for that of management" in the handling of general human resources matters. *Smith v. Leggett Wire Co.*, 220 F.3d 752, 763 (6th Cir. 2000); *see Krenik v. County of Le Sueur*, 47 F.3d 953, 960 (8th Cir. 1995) (holding that courts do not sit as a "super-personnel department"); *see also Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991)(same). I agree and so find.

ORDER

Complainant has failed to establish the required elements of his claim. Accordingly, it is herby **ORDERED** that the claim and relief sought by Complainant be **DENIED.**

IT IS SO ORDERED.

A

ROBERT B. RAE
U. S. 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 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 filings of a 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).