

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 31 January 2013**

Case No. 2011-FRS-11

In the Matter of:

**RAYMOND E. GRIEBEL,**  
Complainant,

v.

**UNION PACIFIC RAILROAD COMPANY**  
Respondent.

Appearances:

Joseph L. Bauer, Jr., *Esq.*  
Baner & Baebler, P.C.  
1716 South Broadway  
Saint Louis, Missouri 63104  
For the Complainant

Fred S. Wilson, *Esq.*  
Leland Willis, *Esq.*  
Union Pacific Railroad  
1001 McKimey, Suite 900  
Houston, Texas 77002  
For the Respondents

Before: John P. Sellers, III  
Administrative Law Judge

**DECISION AND ORDER**

This matter arises out of the employee-protection provisions of the Federal Rail Safety Act (“FRSA” or “the Act”), 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. 110-053 (July 25, 2007), and Section 419 of the Rail Safety Improvement Act of 2008 (RSIA), Pub. L. No. 110-432 (Oct. 16, 2008). The implementing regulations appear at Part 1982 of Title 29 of the Code of Federal Regulations (“CFR”). The FRSA prohibits an employer from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee, if such employee engaged in certain protected activity. Protected activity includes an employee’s lawful and good faith notification, or attempt of notification, to the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee.

## PROCEDURAL HISTORY

On May 7, 2010, Raymond Griebel (“the Complainant”) filed a complaint under the FRSA, alleging that Union Pacific Railroad Company (“the Respondent”) terminated his employment on November 11, 2009, in retaliation for filing a personal injury report. The United Transportation Union filed a grievance on behalf of Complainant and on June 11, 2010, the Public Law Board through Arbitrator John L. Easley issued a decision sustaining the Complainant’s discipline, but returning him back to work with no back pay. An investigation conducted by the Occupational Safety & Health Administration (“OSHA”) of the Department of Labor (“DOL”) followed. On January 24, 2011, the OSHA Area Director found that a preponderance of the evidence supported the Respondent’s position that the Complainant’s protected activity was not a contributing factor in his termination. The complaint was dismissed.

The Complainant’s request for a formal hearing was received by this Office on February 21, 2011. On July 11, 2011, the undersigned issued a revised order cancelling the hearing previously scheduled for July 27, 2011 and requested that the parties select mutually agreeable hearing dates. Pursuant to a Notice of Hearing and Prehearing Order issued September 6, 2011, the undersigned conducted a hearing on this claim on November 30, 2011, and December 1, 2011, in Little Rock, Arkansas. The parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges.<sup>1</sup> At the hearing, the following witnesses were examined:

1. Lori Griebel, wife of Complainant (Tr.<sup>2</sup> 60-75);
2. Jack Lee Givens, employee of Respondent and Union Officer for the Brotherhood of Locomotive Engineers and Trainmen (Tr. 75-114);
3. The Complainant (Tr. 123-236);
4. Monty Whatley, General Superintendent for Respondent (Tr. 238-272);
5. Tobe Allen, Senior Manager of Terminal Operations for Respondent (Tr. 278-331);
6. William Jeffrey Bryant, Manager of Operating Practices for Respondent (Tr. 332-381);  
and
7. Renee Orosco, General Director of Labor Relations for Respondent. (Tr. 382-404).

## EVIDENTIARY RULINGS

At the hearing on November 30, 2011, the Complainant submitted Complainant’s Exhibit 12 (“CX 12”), which is a compilation of previous FRSA complaints filed against the Respondent. After the Respondent’s objection to CX 12, I decided to allow the Respondent an opportunity to respond to this exhibit pending my determination of its admissibility into the record. (Tr. 16-21). Upon consideration of this exhibit, I find that it is technically admissible, but not as evidence that the Respondent violated the FRSA in this case, but only with regard to the issue of punitive damages. And even on the issue of punitive damages, I have not placed any

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<sup>1</sup> 129 C.F.R. Part 18A (2008).

<sup>2</sup> “Tr.” refers to the transcript of the hearing.

real weight on the number of FRSA complaints filed against the Respondent in the past without knowing more about the details and outcomes of those complaints. Rather, as my analysis makes clear, the award of punitive damages in this case arises from its own facts and circumstances.

The Respondent also objected to the admittance of CX 14, which is the Respondent's official injury report form ("Form 52032") utilized to report a personal injury, and, more specifically, was allegedly the form that the Complainant filled out, discarded, but then retrieved from the waste basket. Upon review of the testimony, I have determined that the Complainant has established the authenticity of this exhibit, and moreover, as will be discussed further, has shown its relevance. The probative value of CX 14 outweighs any potential prejudicial effect. Thus, it is accepted into evidence.

In reaching a decision, the undersigned has reviewed and considered the entire record, including all exhibits admitted into evidence, the testimony at hearing, and the arguments of the parties. Where applicable, I have made credibility determinations concerning the testimony.

### ISSUES

The issues contested by the Complainant and the Respondent are as follows:

1. Whether the Complainant's report of a personal injury was a protected activity under § 20109 (a) (4) of the FRSA;
2. Whether the Complainant's protected activity contributed to the Respondent's decision to discharge him;
5. Whether the Respondent can show by clear and convincing evidence that it would have discharged the Complainant absent his protected activity; and
6. Whether the Complainant is entitled to relief under the FRSA, and, if so, the appropriate measure of relief.

### STIPULATED FACTS

The parties agree that the Respondent is a railroad carrier engaged in line haul freight operations throughout the United States, and therefore is engaged in interstate commerce within the meaning of the FRSA. (Tr. 36). The parties further do no dispute that the Complainant was an employee of the Respondent and was therefore covered under the Act. Specifically, they do not dispute that the Complainant was employed as a switchman conductor / remote control locomotive operator ("RCO"). (Tr. 36-37).

## FACTUAL BACKGROUND/TESTIMONY

The Complainant began working for Respondent on July 6, 2004, as a switchman/brakeman/conductor. (Tr. 123; JX 5). On April 8, 2007, the Complainant was promoted to Locomotive Engineer. (Tr. 123). According to the Complainant, he began having back-pain issues starting in 2000 which continued intermittently until roughly 2007. (Tr. 125; 195). The Complainant testified that he discussed his back pain with the Respondent's Manager of Operating Practices, William Jeffrey Bryant, in the fall of either 2006 or 2007. (Tr. 125; 333; 337). He testified that at that time, at the behest of Bryant, he filled out a Form 52032 reporting his back pain to the Respondent. (Tr. 125; 191; 204). According to the Complainant, his back pain was caused by a displaced right hip. (Tr. 127; 190). He testified that after his therapist put the hip back in place, the back pain "went away" until mid-July 2009. (Tr. 127; 216).

The Complainant testified that when his back started hurting him again in 2009, he again sought a physician's care, although his back only hurt when lying flat. (Tr. 127). After negative x-ray results, his physician recommended a course of physical therapy. (Tr. 128). The Complainant testified that he also began to work out in the gym in an effort to lose weight and improve his physical condition. (Tr. 151; 193-194). The two-week period of physical therapy ended on August 26, 2009. (Tr. 195; JX 16). The Complainant testified that he spoke to Mr. Wildschuetz, Manager for the Respondent, about the pain. (Tr. 186). According to the Complainant, Wildschuetz did not tell him that it was necessary to fill out an injury report for his latest episode of back pain. (Tr. 186-187).

According to the Complainant, his physician had scheduled him for an MRI on September 1, 2009, to follow up on his back pain. (Tr. 129-130). On August 28, 2009, however, at around 4:00 a.m., the Complainant was operating a train that derailed while moving at approximately thirteen miles per hour. (Tr. 132). According to the Complainant, as the locomotive derailed he was getting up from his seat and was thrown in the air with his right side landing on the arm of the seat. (Tr. 134-135; 201). Nonetheless, he stated that he did not feel any pain immediately after the derailment. (Tr. 207). He testified that it was approximately thirty minutes later before Tobe Allen, Senior Manager of Terminal Operations for the Respondent, arrived on scene. (Tr. 136; 279). Allen investigated the derailment and asked the Complainant as well as other employees involved, whether or not they were injured. (Tr. 136; 288). The Complainant testified that, "The first statement I said to him was, 'I don't know.'" (Tr. 136).

The Complainant testified that he returned to work for the next day or two following the derailment, but on the morning of September 1, 2009, he experienced "pain [like] I never felt before." (Tr. 136-137; 222). He testified that the pain he felt subsequent to the derailment was different than the pain he had been experiencing before because this was the first he had experienced pain all the way down his right leg. (Tr. 234). Before he went to his previously scheduled MRI, the Complainant called Bryant on September 1, 2009, to report the pain. (Tr. 138; 207). According to the Complainant, this conversation was the first time Bryant had heard about the reoccurrence of his back pain in July 2009, the previously scheduled MRI, and the derailment. (Tr. 139). He stated that the first thing Bryant asked was, "Do you believe this is related to the injury you had back two or three years ago?" According to the Complainant, he responded that he did not believe so. (Tr. 139). He testified that despite the fact that Bryant was

not his direct manager, he had a personal relationship with Bryant and often went to him for advice. (Tr. 143; 215). He testified that he asked Bryant's opinion on whether or not he needed to file a Form 52032, and Bryant responded that because it was four days after the derailment, the Complainant could "possibly get discipline." (Tr. 140). The Complainant testified that Bryant instructed him to wait a week before filing a Form 52032 to make sure that the pain did not go away and that it was in fact related to the derailment. (Tr. 141). According to the Complainant, Bryant instructed him to call him if the pain continued beyond the week. (Tr. 141).

The pain did not go away, however, according to the Complainant. He testified that the pain became so severe it hurt to walk, and that it emanated from his lower back, down his side, and into his right leg and foot. He testified that his last day of work was either the night of September 6, 2009 or the morning of September 7, 2009. (Tr. 137; 148; 234).

The Complainant testified that, on September 8, 2009, he called Jack Givens, a fellow employee of the Respondent and union officer of the Brotherhood of Locomotive Engineers and Trainmen. (Tr. 76; 141). The Complainant informed Givens that he was still experiencing back pain, and Givens contacted Bryant, who subsequently called the Complainant. (Tr. 141; CX 1; JX 15). According to the Complainant, Bryant was upset and said, "[You] probably opened up a can of worms and they're going to fire [you]." (Tr. 141). The Complainant testified that he ultimately told Bryant that he was going to file the Form 52032, and Bryant instructed the Complainant to go to Allen to fill out the form and to call Monty Whatley to tell him. (Tr. 142; 143; 148). The Complainant testified that Allen was his direct supervisor and was in charge of the yard where the derailment occurred and that Whatley was Bryant and Allen's superior. (Tr. 143; 147).

The Complainant testified that prior to going to Allen's office, he spoke with Whatley. (Tr. 147; 148; JX 15; CX 1). According to the Complainant, he told Whatley about his being in therapy prior to the derailment, and explained the results of the previously scheduled MRI. (Tr. 149). According to Complainant, he tried to explain to Whatley that the derailment had made his condition worse. (Tr. 151). The Complainant described the conversation with Whatley as follows:

"Well this sounds suspicious." That's the first thing he said. And then he said, "Are you sure? Can you prove that this accident caused your injury?" and I said, Sir, I'm saying that I believe that the injury exacerbated my condition I was having therapy for. Mr. Whatley said that since I couldn't prove that the accident exacerbated my condition, he wanted me to when I filled out the accident report form, to say that I was not hurt on company property.

(Tr. 150; 151).

The Complainant testified that he spoke with Allen on September 8, 2009, and was told to come in the next day to fill out the Form 52032. (Tr. 144; JX 15; CX 1). The Complainant testified that these injury report forms are kept by managers and are not accessible to anyone other than managers. (Tr. 145). The Complainant testified that he reported to Allen's office on September 9, 2009, and filled out Form 52032 in front of Allen. (Tr. 145-146). He stated that,

after completing and giving the Form 52032 to Allen, Allen handed Complainant another blank Form 52032 along with the Form 52032 he had originally filled out. (Tr. 146). The Complainant testified that Allen highlighted sections of the original Form 52032, indicating that Whatley would take exception with what Complainant had written in those sections. (Tr. 147; CX 14; JX 6A; JX 6B).

Then, according to the Complainant, despite his disagreement about where he suffered his injury, he complied with Allen's instruction to leave blank the section on the second Form 52032 which asked whether he was hurt on or off company property, as well as the section which asked about his condition and when he realized it was related to his work. (Tr. 151:152; 159; JX 6A; CX 4). After completing the second form, the Complainant testified that he crumpled up the original form he had filled out and threw it in the waste basket next to Allen's desk, but later thought better of it and retrieved it. (Tr. 156-157; 158).

The Form 52032 that the Complainant did submit to Allen asked in Section III (1) for a description of the injury. (CX 13). The Complainant filled it out by describing the derailment. Then, the form 53032 asked the Complainant "WHAT SPECIFICALLY CAUSED THE ACCIDENT/INJURY" in Section III (2). The Complainant wrote: "I believe the Derail exag[erated] a pre[-]existing condition that I had[.] But I can[']t Prove that it did." (*Id.*). Elsewhere on the form, the Complainant was asked "WHEN DID YOU FIRST NOTICE SYMPTOMS" in Section V (3). He wrote, "The Pre[-]existing condition was August 5, 09."

According to the Complainant, the following day, on September 10, 2009, Allen called him and told him to report to work. (Tr. 166; JX 15; CX 1). Despite being on prescribed medication, the Complainant reported to work and gave a statement describing his pre-existing back condition, the events surrounding the derailment, and the increased pain he felt afterwards. (Tr. 167; JX 8). The statement reads as follows:

I, Raymond Griebel, was experiencing lower back pain only when I laid down flat on my back at night Prior to the Derail. I had Been to therapy for 2 weeks from Aug 10 to Aug. 21. The Derail occurred on Aug 28 0420 AM. 2009. The Engine jumped up and slam[m]ed down, Jarring me hard in the seat. I experienced no immediate Pain at the time. MGR Tobe Allen asked if I was OK. It wasn't until 4 days after the incident or 96 hours, the morning of Sept. 1st Tuesday 09. That I experienced massive horrible Pain in my Lower But[t] cheek and my Right Leg and Numbness in My right foot. I called Jeff Bryant my MGR on the Sixth day Thursday the 3Rd and told him of my condition. The Pain had Gotten a lot worse from the 4<sup>th</sup> day to the Sixth. I am not 100% shur [sic] the Derail caused my Pain. I Believe it did, But I can't Prove it. Jeff Bryant told me on the 3rd Sept to let him know if it got worse! I had a pre[-]existing condition Before accident. I Believe the Derail aggravated my Pre[-]existing Condition. But it did not cause my Pre[-]existing condition.

(JX 8, p. 166).

The Complainant testified that after he gave this statement, he spoke with Bryant over the phone on September 14, 2009, and September 17, 2009, concerning his having filed an injury report. The Complainant testified that on September 14, 2009, Bryant told him he was in “real trouble” and had “stirred up a hornet’s nest” by filling out a report form. (Tr. 177-178). The Complainant described his conversation with Bryant on the 14th as follows:

He said that he wanted me—that there might be a chance that I might not be in trouble. He wanted me to retract my statement. \*\*\*\* [H]e said there might be a way that I could retract the injury report form and that I might not be in trouble. He’d have to talk about it with Monty Whatley.

(Tr. 178; CX 1; JX 15).

The Complainant testified that later that evening on September 14, 2009, Bryant called him back and told him it was “too late.” (Tr. 178; CX 1; JX 15). The Complainant testified that subsequently Crew Management Services (“CMS”) called him to inform him that Bryant had pulled him out of service for a pending investigation. (Tr. 179). According to the Complainant, he subsequently spoke with Bryant on September 17, 2009, and asked why Bryant had him pulled out of service. (*Id.*). According to the Complainant, Bryant told him that he was pulled from service because of lying, but did not share any other details. (Tr. 180; CX 1; JX 15). Afterwards, the Complainant received a letter notifying him that he was being charged with rules violations and requesting that he be present for an investigation, which took place on November 3, 2009. (Tr. 180; JX 8). The Complainant attended the investigation, and subsequently, on November 11, 2009, received a letter of dismissal, terminating his employment with the Respondent for violation of Respondent’s Rule 1.6. (Tr. 180-18 1; IX 4: 8; 9). Specifically, the dismissal was for “dishonest representations and embellishment of facts and circumstances surrounding an on duty injury,” and “failure to honestly and timely make a report of injury on Form 52032 until September 9, 2009.” (IX 9).

#### Hearing Testimony of William Jeffrey Bryant

Bryant testified that his duties as Manager of Operating Practices for the Respondent encompass the safe operation of trains and ensuring the safety of train crew personnel operating from West Palm to Shreveport (Arkansas). (Tr. 333). Bryant testified that he had known the Complainant since 2006 and that they had a “very friendly professional relationship.” (Tr. 334). Because the Complainant was working as a RCO, Bryant was not his direct supervisor. (Tr. 334). Bryant testified that he spoke with Complainant on September 1, 2009, and described that conversation as follows:

[The Complainant] said his back was hurting and he was going to have to take some time off and he did not want to run a file [sic]<sup>3</sup> with an absenteeism policy and he wanted to know if he needed to fill out a 52032. I asked him at that time, “Well is this the same back trouble you had last year and he said, “Yes, I believe

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<sup>3</sup> Although the transcript reads “run a file with an absenteeism policy,” the transcription is most likely in error and should read “run afoul of the absenteeism policy...”

it is.” So there was no real hurry to fill out a 52032. He already filled one out. We could get to it whenever.

(Tr. 336-337). Bryant testified that he had no idea that a derailment had occurred, and there was no discussion of it during the telephone call. (Tr. 337; 338). Bryant testified that during that same telephone call, the Complainant asked about how an employee could get paid while he was off work. (Tr. 337). According to Bryant, he explained that the Respondent has a program called productive temporary work (“TPW”), which would allow an engineer under the union’s disability policy to be paid. (Tr. 337; 338). As described by Bryant, this program would allow an injured engineer to perform clerical duties on a flexible work schedule to accommodate any therapy the employee may be undergoing. (Tr. 338). However, Bryant explained, since the Complainant had been working as a RCO, he would not have been able to take advantage of such a policy. (Tr. 337). According to Bryant the only difference between an on-duty injury and an off-duty injury is that an on-duty injury would give the injured employee rights under the Federal Employers Liability Act (“FELA”) to recover money. (Tr. 337).

According to Bryant, the first he learned of the derailment was when Givens called him on September 8, 2009. (Tr. 338.) Bryant described the conversation with Givens as follows:

[Mr. Givens] started out, he said, “Jeff, Jack Givens here. Do you know [the Complainant]?” Well of course I know [the Complainant]. “Well he wants to fill out [a] 52032 on account he was injured on a derailment on August 28th.” I said, I couldn’t understand why [the Complainant] didn’t call me himself because usually he calls me with issues like this in the first place. \*\*\* [W]hen Jack and I wound up our conversation, he says, “Well, off the record, I believe he’s been talking to Johnny Peterson.”

(Tr. 339). Bryant testified that he knew Johnny Peterson as a “rainmaker” for the Gray, Ritter law firm, which specializes in FELA claims. (Tr. 339). According to Bryant, he got off the telephone with Givens and immediately called the Complainant. (Tr. 339; JX 15; CX 1A). He described that conversation with Complainant on September 8, 2009 as follows:

Well, I called [Complainant].... \*\*\* I wasn’t in a real good mood. I asked [the Complainant], “You know, it’s kind of highly coincidental to me that when we talked a week ago, there was no mention of a derailment and now all this back trouble is the same back trouble you had previous and now that there’s a derailment involved, it’s all related to the derailment now that you’ve talked to this guy, this Johnny Peterson from the Gray, Ritter law firm. I find that highly coincidental.” [The Complainant] said that he hadn’t talked to that man, but [Mr. Givens] said that he did.

(Tr. 339-340). Bryant testified that Complainant went on and said that he was injured in the derailment and that he wanted to fill out a Form 52032. (Tr. 340). Bryant explained that the Complainant would need to contact Allen to fill out the form because he, Bryant, was not in charge of the area in which the derailment occurred. (*Id.*). Bryant testified that he told the Complainant on September 8, 2009, that if Complainant reported the injury it would be



considered a late report and a violation of the rules which would be assessed a level 3. (Tr. 340; 362). Bryant also testified that if he was the person in charge of the investigation and if the Complainant subsequently produced documentation showing the injury is the type that would not become manifest immediately, he would cancel or stop the investigation that would otherwise commence. (Tr. 341).

Bryant testified that, according to the Respondent's policy, an employee has to fill out a Form 52032 in the presence of a manager. (Tr. 342). Bryant testified that the reason for the policy was that if the employees took them out of the office "they would take them to their FELA attorneys, the FELA attorney would help them fill them out[,] and they would help bring them back in and here we go." (Tr. 342).

Bryant testified that he spoke with Complainant after the investigation was scheduled to personally inform him that he was being pulled from service. (Tr. 343; IX 15). Bryant explained that he made this call despite not being Complainant's direct supervisor because he was designated as the charging officer by Whatley. (Tr. 343; 363). Bryant made clear, however, that it was Whatley, not him, that made the decision to charge the Complainant with dishonesty. (Tr. 369). According to Bryant, it was Whatley who also decided that he, Bryant, would be the charging officer. (*Id.*). It is the charging officer's responsibility to introduce the exhibits into the investigation, similar to a prosecuting attorney, according to Bryant. (Tr. 344). Bryant testified that as the charging officer, he was aware and signed the documents charging the Complainant with a Rule 1.6 violation for dishonesty. (Tr. 363-364). Bryant testified that the Complainant was specifically charged with dishonesty in his narrative on the Form 52032, and, more specifically, for claiming an injury occurred on duty that in fact probably happened off duty. (Tr. 364). According to Bryant, after the Complainant filed the injury report form, he was incapable of stopping the process of investigation from proceeding. (Tr. 344). Bryant testified that the Superintendent in Labor Relations had the responsibility to make the ultimate decision of whether or not to assess a level-5 dismissal. (Tr. 358).

Bryant conceded that the Complainant did not hide the fact that he was having back problems before the derailment. (Tr. 357). Bryant also testified that there was not anything on the face of Complainant's Form 52032 that was dishonest. (Tr. 365; 367; JX 6A). Moreover, Bryant stated that the Complainant had a good work record with Respondent at the time of the derailment and had no prior discipline. (Tr. 361). However, according to Bryant, when examined in the context of the conversations he had with the Complainant, and the fact that Givens had told him that the Complainant had contacted a FELA attorney, a "feeling of dishonesty" arose from the injury report. (Tr. 366). Bryant acknowledged that the Complainant denied having spoken to Peterson, the FELA attorney. (Tr. 368). However, Bryant relied on the assertion by Givens that the Complainant had spoken with a FELA attorney and in his mind the disparity between the conversations he had with the Complainant and Givens was "[o]ne of the reasons" he felt that the Complainant was lying. (Tr. 367-368). Bryant also noted that there was no mention of a derailment in his first conversation with the Complainant, and in his mind the issue of a work-related injury only arose after the Complainant had spoken to Peterson. (Tr. 366). Bryant also, in hindsight, attached significance to the Complainant's inquiry prior to the derailment concerning getting paid for potential time off, and the fact of this earlier conversation also factored into Bryant's conclusion that Complainant was lying. (Tr. 378; 380). Accordingly,

Bryant formed the opinion that Complainant was attempting to defraud the Respondent and sent the charging letter assessing a level-5 dismissal terminating Complainant's employment. (Tr. 374; 377; 378).

Bryant could not recall any details of the conversations between the Complainant and himself which occurred on September 11, 2009, or September 18, 2009. (Tr. 345-346; 352; 358-359; IX 15; CX 1A). Specifically, Bryant testified that he did not remember saying to the Complainant that by filing the Form 52032, the Complainant would "be opening up a can of worms". (Tr. 361-362). However, during the investigation in November 2009, Bryant specifically recalled saying "you know, you're reporting an injury here nearly two weeks after the fact" and "that you may in fact be opening a can of worms here that you don't want to open." (JX 8 at page 129). Bryant also testified that he did not recall the Complainant telling him, prior to coming in to give a statement on September 10, 2009, that the Complainant was on medication. (Tr. 345-346; 352; 358-359; JX 15; CX 1A).

#### Hearing Testimony of Tobe E. Allen

Tobe Allen testified that as the Senior Manager of Terminal Operations for the Respondent, his duties include ensuring adherence to the train plan and the safety processes. (Tr. 279). Allen's duty in regards to the safety processes is to conduct field-training exercises to ensure the crew is adhering to the general code of operating rules. (Tr. 280). Allen testified that the Respondent employs a "total safety culture," which he described as an "employee-empowered program," encouraging and requiring all employees to report any unsafe and dangerous conditions. (Tr. 281).

According to Allen, he found out about the derailment that occurred on August 28, 2009, when the yard master called and informed him. (Tr. 284-285). Allen testified that he responded to the yard master's call by going down to investigate the derailment, and found a train derailed and the crew members standing outside. (Tr. 285). According to Allen, he asked the Complainant several times if he was okay, and he was assured by the Complainant that he was not hurt. (Tr. 287). Allen testified further that no other crew member reported having an injury. (Tr. 287; 288).

Allen testified that around 2:00 a.m. on the morning of August 28, 2009, two hours prior to the derailment, he had conducted a field-training exercise, during which he had a conversation with the Complainant. (Tr. 290). Allen described a field-training exercise as a non-punitive "ride along" with crews to discuss local safety issues or any particular new processes that are being implemented. (Tr. 289; 321). Allen stated that he and the Complainant were only professionally acquainted and that this conversation was their first conversation. (Tr. 319-320). Allen also testified that the Complainant did not hide the back problems he was having prior to the derailment. (Tr. 319). Allen described the conversation with Complainant that morning as follows:

[The Complainant], that particular morning, spoke to me and asked if I knew of a way that he could be off work while he had surgery. \* \* \* He told me it was back surgery and he wanted to know if he could be off work or if there was a way he

could be paid while he was off work for that back surgery. I told [the Complainant] that there's TPW which is temporary productive work. I told [the Complainant] that... was available and he said no, that he would not be able to work, that he just wanted to know if there was a way he could get paid for not working.

(Tr. 290-29 1). Allen conceded that he had not disclosed this particular conversation at the investigation on November 3, 2009, or at the pre-hearing deposition on October 6, 2011. (Tr. 303). He explained that during the investigation a few months after the incident he did not recall this conversation, nor was he asked about it. (Tr. 302). He testified that he recalled that this prior conversation took place, but did not realize that it had taken place hours before the derailment until he had reviewed his Field Training report forms prior to testifying at this hearing. (Tr. 301-302).

Allen testified that Whatley contacted him and informed him that the Complainant would need to come in and fill out the personal injury report. (Tr. 293; 327). Allen testified that he did not tell Whatley of the 2:00 a.m. conversation with the Complainant that he alleged took place before the derailment. (Tr. 327). Allen testified that he then called the Complainant on September 9, 2009, and requested that Complainant come in to complete the personal injury report form. (Tr. 304). Allen testified that on the evening of September 9, 2009, he was in his office with the Complainant and witnessed the Complainant fill out the Form 52032. (Tr. 293; 305; 306; 307).

Allen testified that the Complainant only filled out one Form 52032 and further testified that he never pointed out any inadequacies on the form nor instructed Complainant to fill out a second form. (Tr. 294-295; 296-297; 324; 329). Allen further stated that he could not recall that he had any real significant discussion with the Complainant concerning the contents of Form 52032. (Tr. 329). Allen explained that the forms were kept on a desk at the Manager of Terminal Operations office in a common area, in a tablet so that individual forms could be torn off (Tr. 295; 306-307). While it is not under lock and key, Allen explained that it was the Respondent's policy to have company officers give Form 52032 to the employee and then facilitate and watch them fill it out. (Tr. 295; 305; 327; 330). However, according to Allen, there is nothing to prevent an employee from coming in and grabbing a form and filling it out by himself. (Tr. 327). Allen testified that if an employee were to take and fill out a Form 52032 outside of a manager's presence, there would not be any discipline for such behavior. However, he made clear that a form filled out outside the presence of a manager would not be accepted. (Tr. 330). Allen could not remember where the Complainant was when he retrieved the form from the common area for the Complainant to fill it out. (Tr. 307).

Allen testified that it took the Complainant approximately one hour to fill out the Form 52032. (Tr. 306). According to Allen, after the Complainant completed the single Form 52032, he, Allen, left the office for about ten seconds and made the Complainant a copy of the form. (Tr. 294-295; 308). Allen testified that from his office, where the Complainant had filled out the injury report form, to the room where the copier was located, amounted to a distance of approximately twenty feet. (Tr. 308). Allen stated that upon the Complainant's request, and in accordance with the Respondent's practice, he gave the Complainant a copy of the form. (Tr.

295; 308; 317). Allen testified that except for the brief period when he made a copy of Form 52032, he was with the Complainant the entire time, including when the Complainant left his office. (Tr. 305; 309; 316). Allen interpreted the Complainant's completed Form 52032 to mean that the Complainant had suffered an on-duty injury the night of August 28, 2009. (Tr. 324). Allen testified that he did not notice that there were blank sections on the Complainant's completed Form 52032. (Tr. 328; IX 6A). These injury report forms are to be facilitated by management and, according to Allen, if a section is left blank he can bring it to the attention of the employee but if the employee wants to leave it blank he still has to accept it. (Tr. 327; 329). Allen made clear that the Respondent wants employees to fill out injury report forms as completely as possible. (Tr. 329).

Allen testified that he did not recall having seen the Complainant two days in a row, on the 9th and 10th of September 2009, until after he looked at Complainant's phone records and written statement dated the 10th. (Tr. 318; IX 8 at page 167; 15; CX 1). Allen testified that his recollection of the events surrounding this incident "is not that great". (Tr. 319). He stated that he was present on September 10, 2009, when the Complainant came into the office and wrote a statement. (Tr. 297). Allen requested that Complainant write a statement on September 10, 2009, because the Respondent required an explanation for the lapse in time between the derailment and the filing of the personal injury report. (Tr. 297-298; IX 8 at page 167).

#### Hearing Testimony of Monty Whatley

Monty Whatley testified that as the General Superintendent for the Respondent, his responsibilities include oversight of the entire geographic area in Little Rock, Arkansas. (Tr. 239). Whatley testified that his involvement in this case began when he received a telephone voicemail from the Complainant on September 8, 2009. (Tr. 240). Whatley testified that he returned the call and spoke with the Complainant the following day on September 9, 2009. (Tr. 240; JX 15). Whatley described that conversation as follows:

[The Complainant] explained that he was having some trouble with his back and that he had also been involved in a derailment that occurred. I believe that was the prior month on August 28th, I believe and that he was thinking that the derailment could have caused the problems with his back. He went on to tell me about some problems that he had with his back prior to that. He was pretty specific about spending some time in a weight room as part of a weight[-]loss program he was on, that sort of thing and so that prompted me to ask him how he knew the problem with his back was related to the derailment versus some other things. [I] learned later that he had already had some treatment for his back. So, basically it got down to me asking him the question, Are you sure it happened at work and he said, "Well, I'm not sure, but I think it did" or something like that.

(Tr. 241). Whatley testified that this was the first he had heard that Complainant was possibly injured in the derailment. (Tr. 243).

Whatley testified that he told Complainant, "You kind of need to know where it happened. You kind of need to be sure about it." He testified that he explained to the

Complainant that the company had an obligation of reporting to the Federal Government, and those reports needed to be accurate. (Tr. 241). Whatley testified that the Complainant asked his advice in terms of reporting the injury and filling out the report. (Tr. 241). Whatley testified that he could not really advise the Complainant on what to do, and told him that he needed to decide where the injury occurred. (Tr. 241). Whatley testified that he asked the Complainant whether or not his injury occurred on duty, and the Complainant responded that he could not be sure where it really happened. (Tr. 242). Whatley testified that there is a list of questions on the injury report form and he wanted the Complainant to fill those out consistent with their conversation. (Tr. 242). Whatley testified that he requested to have the Complainant come in on September 10, 2009 to provide a statement because the information provided on the report was not nearly as comprehensive as the discussion that he had with Complainant. (Tr. 246; JX 8 at page 167).

Whatley testified that subsequent to the conversation with the Complainant on September 9, 2009, he spoke with several managers, including Bryant and Allen. (Tr. 243). Whatley testified that in his conversations with management he learned that the employees were questioned at the time of the derailment and none of them reported an injury. (Tr. 244). Whatley testified that he understood that some injuries may become manifest after the accident that caused the injury, but that the employees involved in the derailment were “pretty adamant” about being “okay.” (Tr. 244). Whatley testified that he found his conversation with Bryant the most interesting because Bryant indicated he had a conversation with the Complainant about needing some time off. (Tr. 244; 266). Whatley testified that he believed the conversation Bryant had with the Complainant was about pre-existing back pain because there had been no mention of the derailment and Bryant had dealt with Complainant about some previous attendance issues. (Tr. 244). Whatley testified that his conversation with Allen also reinforced his decision to charge the Complainant with discipline. (Tr. 266). Specifically, Whatley testified that he learned from Allen that Complainant and Allen spoke on the morning of the derailment about how to get paid while off work due to surgery. (Tr. 266).<sup>4</sup>

Whatley testified that he believed Complainant was reporting an injury that did not occur at the workplace. (Tr. 251; 261). He stated that, in his view, “the report itself is dishonest.” (Tr. 263). He acknowledged on the Form 52032 he filled out, the Complainant had written, “I believe the derail[ment] exaggerated [sic] a pre-existing condition.” He also acknowledged that the Complainant did not withhold any information regarding his previous injury, and did not fabricate the derailment. (Tr. 265). He further conceded that it was a legitimate concern for a person who may be facing a significant amount of time off for medical reasons to make inquiries concerning paid leave. He testified that at the time of the investigation, he knew that the Complainant had had surgery for a ruptured disc. (Tr. 270). Nonetheless, Whatley testified that he believed that the Complainant knew he did not get injured in the derailment but reported that he did anyway. (Tr. 263).

Whatley testified that he ultimately made the decision to charge Complainant with discipline that led to the investigation. (Tr. 244). Whatley testified that the actual charge against

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<sup>4</sup> As noted earlier, Allen testified that he did not recall the conversation he allegedly had with the Complainant regarding paid leave until just before the hearing, and that he had apparently forgotten about it during the investigation or at the time of his pre-hearing deposition. (Tr. 301-202). Whatley testified, however, that he learned of the conversation from talking to Allen at the time he decided to charge the Complainant with dishonesty.

Complainant was a Rule 1.6 violation, specifically listing dishonesty as the conduct Complainant engaged in. (Tr. 251; IX 4; 9; CX 3). Whatley explained that Complainant's report of injury also violated Rule 1.2.5, which is a rule against late reporting. (Tr. 252). Whatley testified that Respondent does not "stack" discipline together, and that this incident was treated as one event. (Tr. 252).

Moreover, Whatley testified that the biggest reason for his decision to charge the Complainant was based on a question the Complainant made to him asking how to get paid if he had to have surgery and take off work. (Tr. 245). Whatley testified that this statement led him to believe that the Complainant needed to have surgery regardless of whether the derailment contributed to his injury or not. (Tr. 245).

Whatley also testified that the inconsistency with what the Complainant put on the Form 52032 and their earlier conversation also led him to decide to charge the Complainant with discipline. (Tr. 245). According to Whatley, the inconsistency between the completed form and his conversations arose from the fact that when the Complainant filled out the report he seemed to be pretty certain of how it took place whereas during their earlier conversations the Complainant was very unsure about where and how the injury had occurred. (Tr. 245; 262). Asked whether a person should fill out a report of injury if they are genuinely uncertain whether it was work-related, and how they were supposed to express such uncertainty, Whatley replied that despite any uncertainty, employees have to make their own decision as to whether they were hurt or not and make their own decision as to what caused the injury. (Tr. 264). Asked whether it was the Respondent's position that an employee had to be 100% certain of the cause of injury before filing a report of injury, Whatley replied that that he did not think that the Respondent "really [had] an opinion on that." (*Id.*) Pressed to explain what an employee should do, absent 100% certainty as to causality, Whatley replied, the employee had "to make a call." (*Id.*)

Whatley testified that he did not personally believe the Complainant's pre-existing condition was aggravated in the August 28, 2009 derailment. (Tr. 266). He testified that he was aware of the Federal Railroad Administration Guidelines ("Guidelines") for preparing and filling out injury reports prior to making the determination to charge the Complainant with discipline. (Tr. 267-270). Whatley verified that the Guidelines address the effect of a work-related injury upon a pre-existing injury. (Tr. 270; JX 8 at page 166). He testified that he was aware of the Guidelines' direction on how to handle a case where it is not obvious if the injury occurred at work. Specifically, he acknowledged that the Guidelines direct a manager to "evaluate the employee's work duties and environment to decide whether it is more likely than not that one or more events or exposures in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing condition." (Tr. 269; IX 8 at page 166). Whatley testified that he did not recall when he learned that the Complainant had undergone surgery. (Tr. 270). Whatley also testified that he did not know the Complainant's doctor wrote a report based on the MRI before the derailment and the MRI after the derailment indicating there was a ruptured disc in his back that was not present before the derailment. (Tr. 270-271; JX 17; CX 6). Whatley testified that he didn't recall the Complainant having any prior disciplinary issues. (Tr. 272).

Whatley testified that a clerical error was made when two dismissal letters were sent to the Complainant after the investigation on November 3, 2009. (Tr. 248; JX 9; CX 3). He testified that he did not review the transcript of the investigation and did not make the final decision to terminate the Complainant after the investigation. (Tr. 248; 250; JX 8). He testified that it would have been inappropriate for him to review the transcript of the investigation and make the decision because he was a witness in the investigation. (Tr. 249). Whatley testified that to ensure impartiality, Jeff Jones, General Superintendent of Transportation Services for the Respondent, reviewed the transcript from the investigation and made the decision to terminate the Complainant's employment. (Tr. 249-250; RX 1). Whatley testified that the final decision also would have included the Respondent's Labor Relations department. (Tr. 250).

#### Hearing Testimony of Jack Lee Givens

Jack Lee Givens testified that as an employee of the Respondent and union officer for the Brotherhood of Locomotive Engineers and Trainmen ("BLET"), it is his responsibility to represent members of BLET. (Tr. 77). Givens also testified that part of his responsibility in representing members of the BLET is to advise them regarding their rights and obligations as an employee of the Respondent. (Tr. 84). According to Givens, the United Transportation Union ("UTU") also represents employees of Respondent, but primarily trainmen and only a few engineers. (Tr. 77; 85).

Givens testified that the Complainant was working as a trainman during the derailment, but was a member of the BLET. (Tr. 77; 86). As such, Givens testified that he was the Complainant's representative in August and September of 2009. (Tr. 77). However, Givens testified that he did not represent the Complainant during the investigation. (Tr. 85). Givens explained that the UTU has an exclusivity agreement with the Respondent, allowing the BLET to represent the employee until they are served with a certified notice of investigation. (Tr. 85). Givens testified that this agreement dictates that once the employee is served with a notice of investigation, the UTU becomes the sole representation for the employee. (Tr. 85). Because the Complainant was working as a trainman at the time of the derailment and alleged injury, he fell under this exclusivity agreement and when the Complainant received the notice of investigation, the UTU assumed sole representation rights. (Tr. 86).

Givens testified that the Complainant called him on September 8, 2009, to notify him of his injury in the derailment. (Tr. 78; JX 15). Givens clarified that the September 8th telephone conversation was the first he spoke with the Complainant about the derailment. (Tr. 78; 92). He testified that it is normal procedure for an employee to contact his union representative under such circumstances to get advice. (Tr. 78). He described his telephone conversation with the Complainant as short. (Tr. 79). According to Givens, during this conversation he asked the Complainant if he had notified anybody else about his injury in the derailment, and the Complainant said he had not. (Tr. 79). Because Givens believed that that it was his duty to report such injury, Givens called Bryant to notify him of what had occurred. (Tr. 79; 97). Givens testified that Bryant already knew about the derailment but was not aware that the Complainant was injured. (Tr. 80). According to Givens, when he informed Bryant that the Complainant was going to file an injury report, Bryant stated, "Well, we'll see about that." (Tr. 80).

Givens testified that the Complainant called him on September 10, 2009, from the Respondent's parking lot and said that Allen had asked him to come in and fill out a statement. (Tr. 81). Givens testified that he advised the Complainant that because he was on medication prescribed by his physician, he was not required to give a written statement. (Tr. 89; 98). Despite this advice, the Complainant went in to work and gave a written statement. (Tr. 81; 98). Givens testified that he wasn't present when the Complainant filled out the injury report on September 9, 2009, or when Complainant gave his written statement the following day. (Tr. 84).

Givens testified that he was concerned about the Complainant's failure to report the injury earlier. (Tr. 93). He testified, "I believe it's [the Respondent's] policy that if you have an accident and you think you're hurt even though sometimes you don't know you're hurt until the next day or so, [the Respondent] wants it [reported] now." (Tr. 93). He noted that the Respondent's Rule 1.2.5 states that an employee is supposed to report an injury immediately once they become aware of it. (Tr. 93; JX 3). However, Givens stated that in practice, it is the Respondent's policy that, "you report it at the time of the accident or the hatchet comes out." (Tr. 93). Givens commented further that, "There's what's in the book and then there's normal practice." (Tr. 96). He characterized the normal practice as, "If you get hurt, don't tell." (Tr. 101). According to Givens, it is better not to report an injury if you can go home and walk it off or sleep it off, or take a pill. (Tr. 101). He testified that if an employee does have an injury, that he would recommend not getting any drugs for the injury so it does not become reportable. (Tr. 101). He explained that the Respondent has a duty to report an injury to the FRA if an employee gets some sort of narcotic or prescription medication. (Tr. 96; 101-102).

According to Givens, the Respondent discourages the reporting of injuries because of the hassle management has to go through to report it and to prevent the bosses from getting in trouble. (Tr. 108). Givens testified, "It's a crazy mentality on the railroad." (Tr. 108). Givens testified that if an employee gets hurt in a derailment on Day 1, and experiences nothing more than a twinge in his back, but later on Day 5 the pain worsens and the employee thinks he has incurred an injury from the derailment, the report of injury will be considered late and the employee terminated. (Tr. 110; 112). Givens testified that based on his experience as a representative of members of the BLET, 70% of employees who are deemed to have filed a late injury report are charged with a violation of the Respondent's rules and terminated. (Tr. 88; 112). According to Givens, the result is that a lot of employees do not file an injury report despite suffering an injury while at work. (Tr. 89). Givens described the impact of such a policy as requiring employees to walk "a narrow line" and "report [an injury] right now or you're gone." (Tr. 89). Givens described the environment as one of intimidation and testified that people were afraid of losing their jobs over a minor injury. (Tr. 89).

#### Hearing Testimony of Renee Orosco

Renee Orosco testified that as the General Director of Labor Relations for the Respondent, it is his responsibility to administer the collective bargaining agreements, to oversee the group handling arbitration cases, and most recently to oversee the employee assistance program and communication strategy with the Union. (Tr. 382-383). Orosco testified that he was not involved in the actual discipline or termination of the Complainant. (Tr. 384).



Orosco testified that he was a member of a cross-functional team that produced the current disciplinary policy for the Respondent. (Tr. 385). He testified that in the late 1980s, an employee survey was conducted in which employee feedback was utilized to change the discipline policy. (Tr. 385). According to Orosco, “[T]he focus really was to provide a mechanism to address policy and rules violations, but making sure that it was consistent and fair....” (Tr. 386). In addition to ensuring fairness and consistency, Orosco stated that there was an effort to “move away from the punitive nature of discipline and focus [on] training and education.” (Tr. 387). Orosco testified that the Respondent’s policy is also focused on communication through counseling and conferencing, with the ultimate goal being to minimize punitive discipline by addressing issues before they reach the formal-discipline stage. (Tr. 387). Orosco testified that the current policy went through several revisions since the late 1980s. (Tr. 391). He testified that a person’s employment may be terminated through either a progressive process or by certain severe violations. (Tr. 387). Orosco explained the progressive process as allowing an employee who receives discipline to either clear their record by not having any other discipline for a year after the discipline, or else suffer a higher level of discipline if another discipline event occurs within a year. (Tr. 390; 397).

Orosco testified that the Respondent has levels 1 through 5, and that level 4 has a subcategory which is reserved only for violations that cause serious damage but do not rise to a level-5 termination. (Tr. 393). He explained that some violations carry with it suspensions, but employees are afforded an opportunity to reduce the amount of time off work by attending paid training. (Tr. 389-390). The corresponding discipline for each level assessed is as follows: “Level 1” is counseling; “Level 2” is a one-day paid suspension spent in training; “Level 3” is a five-day unpaid suspension that could be reduced to a one-day suspension; “Level 4” is a ten-day unpaid suspension that can be reduced through training; “Level 4C” is a sixty-day suspension that can be reduced through training; and a “Level 5” is termination of employment. (Tr. 394-395; 396).

Orosco testified that if, after an investigation, an employee is found to have a Rule 1.6 violation, they will be assessed a level-5 discipline and their employment would be terminated. (Tr. 388). He explained there are certain behaviors that are considered so severe that they break the trust of the employer-employee relationship, and dishonesty is one such behavior. (Tr. 388). Other Rule 1.6 violations include felony convictions, incidents involving weapons, and altercations. (Tr. 388). Orosco explained that the Respondent’s policy includes other rules which have different levels attached to each, such as Rule 1.2.5 requiring timely reporting of an injury. (Tr. 389). Orosco testified that to violate Rule 1.2.5 is a level-3 offense. (Tr. 389). Orosco testified that the intent of Rule 1.2.5 is to inform employees that injuries need to be reported immediately. (Tr. 403). He stated that an incident in which an injury was incurred and only later manifested itself would have to be reviewed individually according to the unique set of facts presented. (Tr. 403). He testified that discipline cannot be assessed until the employee has had due process, meaning that all the facts must be brought out, an investigation completed, and the charge proven. (Tr. 403).

Orosco testified that the changes in policy eliminated the inconsistency that was occurring in the past, where two employees found to have violated the same rule would receive two different levels of discipline. (Tr. 389). He testified that termination is not a desirable

outcome, because the Respondent has invested a lot of time and money in each employee. (Tr. 391-392).

Orosco explained that the discipline policy applies across the system and to the Respondent's thirteen unions and their members. (Tr. 386). He further explained that the discipline policy is a tool that the Respondent has the ability to change and modify, although the Respondent must follow all thirteen collective bargaining agreements. (Tr. 386). Orosco testified that, "[T]he employees have their due process through their collective bargaining agreement," and each violation must be proven through the formal process of investigation. (Tr. 388; 390). After discipline is assessed by the Respondent, the employee can appeal to the Public Law Board. (Tr. 399). The Public Law Board is a neutral and separate body that hears the appeal of a member challenging assessed discipline, and can decide whether or not the discipline was proper, and the Board has the power to return a terminated employee to work. (Tr. 396; 398-399). Orosco testified that the Public Law Board has several options in addressing the appeal of the disciplined employee. (Tr. 399). According to Orosco, 60%-70% of the time the discipline is upheld, 10%-15% of the time the employee's claim is sustained, and 10%-15% of the time the Public Law Board returns the employee back to work on a leniency basis but determines the discipline assessed was appropriate and does not award back pay. (Tr. 399). Orosco testified that during this step in the process the employee is represented by a union official and is not entitled to representation by an attorney. (Tr. 400).

Orosco testified that the thirteen collective bargaining agreements govern this entire process, dictating things such as time limits, procedure, and who has the power to hear appeals. (Tr. 400). According to Orosco, the Respondent and the union look at a list of neutral arbitrators and agree on a particular arbitrator that will hear the appeal. (Tr. 401). He explained that if there is no agreement on an arbitrator, the parties resort to a strike method of selection, by taking turns crossing a name off the list until one is selected. (Tr. 401).

#### Hearing Testimony of Lori Griebel

Lori Griebel, the Complainant's wife of fourteen years, testified about the effect his discharge had upon her husband. (Tr. 62). "[He] just couldn't believe it. He loved the railroad. It's the job he always wanted and he worked hard at it and gave it everything and he just couldn't believe that this was happening to him." (Tr. 62). Griebel described the Complainant's disposition afterwards. "You'd thought somebody kicked him in the gut. He was just devastated. He was very moody. He was upset." (Tr. 63).

Griebel testified about the Complainant's back condition prior to August 28, 2009. "[When] he'd lay [sic] down at night, sometimes his back would ache. So he went to the doctor." (Tr. 70). Griebel explained that it was not long after this pain started that the Complainant went to see a doctor. (Tr. 71). Griebel also described the Complainant's workouts in the gym. "He was trying to lose weight. The doctor had given him some stuff to help him lose weight. So, he continued on his normal exercise routine." (Tr. 71). Griebel was not sure how many times a week the Complainant went to the gym, nor what exercises he did when he went. (Tr. 71).

Griebel testified that the Complainant was the sole support for herself and their two daughters. (Tr. 61; 63). She explained that they lost health-insurance coverage and could not afford private health insurance for herself or her daughters. (Tr. 63). She testified that they had to keep the Complainant's insurance because of his condition and subsequent surgery. (Tr. 63). She testified about the cost of Complainant's insurance. "[We] had to come up with \$300 in November to catch him up for... October, November and December. Then they sent us a letter saying we could pay his insurance at regular price. For the first six months, it would be \$100.00 a month and from the seventh month through the twelfth month, it would be \$175.00 a month, and after that it would have to go to COBRA."<sup>5</sup> (Tr. 64; 72). However, Griebel explained that they never had to pay the increased premiums for COBRA, because the Complainant had found other employment which provided health insurance. (Tr. 72).

Griebel testified that as soon as the Complainant found out his employment was terminated, he filled out applications and looked every day to find a job. (Tr. 64). Griebel explained that it was discouraging because he had to list where he last worked and disclose why he did not have a job. (Tr. 64). Despite the difficulty, Griebel testified that in May or June of 2010, the Complainant got a low wage earning job cleaning up chemicals from factories. (Tr. 65).

According to Griebel, the Complainant had surgery in October of 2009, and by November 17, 2009 when his doctor released him to work, the Complainant could have performed the job duties at the railroad without incident. (Tr. 73). Griebel testified that Complainant did ultimately return to work for Respondent in August of 2010. (Tr. 66). According to Griebel, his return improved the Complainant's mood. (Tr. 66).

### Medical Evidence

The Complainant presented to Dr. Jason Merrick, M.D. on August 11, 2009. (JX 17, p. 21). Dr. Merrick described the Complainant as a 44-year old male with a long history of low back pain. He added: "Most recent onset was 6 to 7 weeks ago." He noted that the Complainant's history included two herniated discs throughout his lower back, and that on the day of evaluation he presented with complaints of "intermittent sharp pain" throughout the lower right back region which radiated down into his hip and upper leg "but not past the knee." According to Dr. Merrick, the Complainant denied any numbness or tingling in the lower extremities. A course of non-surgical treatment was outlined.

The Complainant presented for an initial evaluation at the Arkansas Specialty Spine Center on September 10, 2009. (JX 17, p 27). He was seen by Dr. Brent Sprinkle, D.O. His chief complaint was described as "[l]ow back, right hip and leg pain for about a month." Under "HISTORY OF PRESENT ILLNESS," Dr. Sprinkle wrote: "Can be severe. Can be sharp, stabbing, throbbing, aching. Worse with standing, walking, exercise, lying, bending, squatting, kneeling, stairs, sitting, coughing, sneezing. Tried hydrocodone but didn't really help. Had

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<sup>5</sup> There was conflicting testimony under cross-examination on page 72 of the transcript, indicating a discrepancy in the cost for private health insurance. Specifically, Griebel answered that from the seventh month through the twelfth month, the cost of insurance would only be \$75.00 a month instead of \$175.00 a month.

therapy that didn't help." Dr. Sprinkle interpreted the x-ray as showing "disc space narrowing at 5-1." He stated that the MRI showed "right paracentral herniation of 5-1 causing right S1 nerve root impingement." (*Id.* at 28). His impressions were: 1) lumbar degenerative disc disease, 2) lumbar disc herniation, and 3) right S1 nerve root impingement. The Complainant was given an injection and medications, and Dr. Sprinkle indicated that he would consider a surgical consult if he did not respond to the treatment. (*Id.* at 29).

Dr. Sprinkle later referred the Complainant to Dr. Justin Seale, an orthopedist. (JX 17, p. 23). The Complainant presented to Dr. Seale on September 30, 2009, with a chief complaint of pain in the right buttock and leg pain. Dr. Seale noted that the Complainant had taken a "sharp jolt" to his lower back in a derailment on August 28, 2009, and during the course of the following few days, had begun to experience progressively worsening low back pain as well as right leg pain. He noted that the Complainant had a previous history of low-back pain, but that the leg pain had only developed after the derailment. He described the pain as "extremely severe, sharp, stabbing, throbbing, aching, and constant," as well as keeping the Complainant up at night. He also noted that the Complainant was having "numbing, tingling and weakness in his leg." Dr. Seale reviewed the Complainant's x-rays from the spine dated September 10, 2009, as well as the Complainant's MRI from September 1, 2009. His impression was a herniated disc as a result of an acute injury incurred on August 28, 2009, as well as chronic degenerative disc disease unrelated to the incident. He added:

At this time I discussed with [the Complainant] that, given his current pattern of symptoms, there is no doubt in my mind that his current disc herniation and symptoms are related to his work incident on 08/28/09. Of course, this is going by his word. He does have some history of low back problems prior to the incident, but also prior to the incident he was having no lower extremity pain. He does have degenerative disc disease in his low back which would explain the chronic back pain. However, the disc herniation is new when compared to an MRI in 2007. Thus, I feel that this is an acute injury sustained on 08/28/09.

(*Id.* at 24). The plan was for the Complainant to undergo a L5-S1 "microdiscectomy." (*Id.*).

Dr. Seale performed a partial "microdiscectomy" on October 2, 2009. (JX 17, p. 3).

In a post-op visit dated October 28, 2009, Dr. Seale stated that the Complainant was doing "extremely well" after his surgery. (JX 17, 1). According to Dr. Seale, the Complainant stated that his leg pain was completely resolved and that he was ready to return to full normal work. Dr. Seale described the Complainant as having "some low back problems due to some mild degenerative disc disease in the low back until he sustained an injury at work on 08/29/09, from which he developed leg pain afterwards." Dr. Seale also stated that he felt "with greater than 50% medical certainty" that the Complainant's current injury that required surgery "was sustained during a work injury on 08/28/09." Dr. Seale then again noted that the Complainant was doing "exceptionally well" after his surgery, and therefore he was "returning him back to light duty work with no bending, twisting or lifting over 15 pounds." However, he stated that after November 17, 2009, the Complainant would be at maximum medical improvement and

could return to normal work without restrictions, with an impairment rating of 8% resulting from “a surgically treated disc lesion without residual signs or symptoms.” Dr. Seale further stated that he was releasing the Complainant from his medical care.

### Public Law Board

Following his dismissal, the Complainant consulted with his union representative, Frank Evans of the United Transportation Union, to determine whether to appeal his case to the Public Law Board. (Tr. 181). The union ultimately appealed Complainant’s case to the Public Law Board. (Tr. 182). On June 11, 2010, the Public Law Board expressed its opinion that the Complainant “was late in reporting the injury and not totally candid when conversing with MOP Bryant nor General Superintendent Whatley.” The Board therefore found that the Complainant’s discipline “was warranted” but had “served its purpose.” The Board ruled that the Complainant should be reinstated with all rights unimpaired within 30 days, but contingent upon the Complainant taking and passing all required examinations. (JX 10). The Complainant should have been returned to work by July 11, 2010, but due to a delay in receiving a letter from Whatley, the Complainant did not schedule the required “rules test” until August 9, 2010. (Tr. 211-212; JX 10). Ultimately, and in accordance with the June 11, 2010, decision, the Complainant was returned to work after passing the “rules test” on August 11, 2010. He did not receive back pay. (Tr. 182; IX 5; 10).

### APPLICABLE LAW

The Federal Rail Safety Act (“FRSA”) provides for employee protection from discrimination if the employee has engaged in protected activity while employed by a railroad carrier engaged in interstate or foreign commerce. 49 U.S.C. § 20109 (a). Specifically, the FRSA prohibits an employer from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee if such discrimination is due, in whole or in part, to the employee’s protected activity. 49 U.S.C. § 20109 (a). An employee engages in protected activity if, among other things, the employee in good faith, notifies or attempts to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness. 49 U.S.C. § 20109 (a)(4).

On August 3, 2007, President Bush signed “The Implementing Recommendations of the 9/11 Commission Act of 2007,” designated as Public Law No: 110-053, 121 Stat. 266. Under that law, Congress transferred authority for rail employees’ whistleblower claims from the National Railroad Adjustment Board to the Department of Labor under OSHA. The August 2007 amendments also changed the legal burdens of proof standard for FRSA claims, requiring they be harmonized with the Wendall H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21”), codified at 49 U.S.C. § 42121. The 2007 FRSA Amendments became effective on August 3, 2007, the date the statute was enacted. *See Abbott v. BNSFRy. Co.*, 2008 WL 4330018 (D. Kan. Sept 18, 2008). OSHA’s jurisdiction over such claims became effective on that date. *Xavier A. Rosadillo v. Union Pacific Railroad Co.*, ARB Case No. 10-085 AU Case No. 2009-FRS-008.

The FRSA was amended further by Public Law 110-432, 122 Stat. 4892, Div. A, Title IV, section 419 (Oct. 16, 2008). The interim final text of regulations governing the employee-protection provisions of the National Transit Systems Security Act ("NTSSA"), enacted as Section 1413 of the Implementing Recommendations of the 9/11 Commission Act of 2007 ("9/11 Commission Act"), and the Federal Railroad Safety Act ("FRSA"), as amended by Section 1521 of the 9/11 Commission Act, became effective on August 31, 2010.

## DISCUSSION

As a preliminary matter, the Complainant, in order to have a cognizable claim under the Act, must be employed by a covered employer, which is defined by the FRSA as a railroad carrier engaged in interstate commerce. 49 USCS § 20 109(a). The parties agree that Respondent is a railroad carrier engaged in interstate commerce and that the Complainant was an employee of Respondent. (Tr. 36-3 7). Therefore I find the parties fall under the jurisdiction of the FRSA.

In order to prevail on his FRSA claim, the Complainant must prove by a preponderance of the evidence that "protected activity was a contributing factor in the adverse action alleged in the complaint." 29 C.F.R. §1982.109(a). If the Complainant has satisfied its burden, however, the Respondent may avoid liability by demonstrating by clear and convincing evidence that it "would have taken the same adverse action in the absence of any protected behavior." 29 C.F.R. §1982.109(b).

### Elements of a *Prima Facie* Claim

To satisfy his *prima facie* burden under the FRSA, the Complainant must prove, directly or indirectly, by a preponderance of the evidence that: (1) he engaged in protected activity as defined by the FRSA; (2) his employer knew he engaged in the protected activity; (3) he was subjected to an unfavorable personnel action; and (4) his protected activity was a contributing factor that led to the unfavorable personnel action. *See* 49 U.S.C. § 42121(b)(2)(B)(i); 29 C.F.R. Part 1979.109(a); *Clemmons v. Ameristar Airways Inc., et al*, ARB No. 05-048, AU No. 2004-AIR- 11, slip opinion at 3 (ARB June 29, 2007); *Sievers v. Alaska Airlines, Inc.*, ARE No. 05-109, AU No. 2004-AIR-028 (ARB Jan. 30, 2008).

Each of these elements will be discussed in turn.

#### 1. The Complainant Engaged In Protected Behavior

The FRSA protects from retaliation or discrimination any employee, who in good faith, notifies or attempts to notify the railroad carrier of a work-related personal injury. 49 U.S.C. § 20109 (a)(4). The Complainant has alleged that he engaged in protected activity by notifying the Respondent of a personal work-related injury.

It is undisputed that on September 9, 2009, the Complainant went to the office of Allen and completed a Form 52032 reporting that he suffered a work-related personal injury in the train derailment that occurred on August 28, 2009. However, the FRSA does not protect

fraudulent or dishonest notification. It specifies that the notification or attempt of notification must be done in good faith. Thus, it must be determined whether the Complainant's notification of his alleged injury was done in good faith such that it is considered a protected activity.

The Complainant alleged that he disclosed his prior back condition to the Respondent, and was reporting an exacerbation of a pre-existing injury as a result of the derailment. The Form 52032 which the Complainant completed and Respondent accepted clearly supports this allegation. The Complainant's written statement rendered during the investigation also supports this position. Bryant testified that he was aware of the Complainant's previous back condition and that the Complainant did not hide the fact that he was having back problems before the derailment. (Tr. 336; 357). Bryant also testified that there was not anything on the face of the Complainant's Form 52032 that was dishonest. (Tr. 365; JX 6A). Similarly, Whatley testified that the Complainant disclosed his preexisting back condition and told the truth about the derailment, and that Complainant listed all of this in his injury report and wrote it in his statement. (Tr. 264-265). Further, the Complainant's physician, Dr. Justin Seale an Orthopedic Surgeon, examined the Complainant after the derailment and determined that more likely than not, the Complainant had in fact sustained an acute injury at work in the August 28, 2009 derailment. (Tr. 220-221; JX 17).

At the hearing, the Respondent's witnesses took the position that the Complainant's dishonesty, and thus bad faith, was not evident from the report itself, but, rather, apparent when considering earlier conversations in which he allegedly expressed doubts concerning whether the derailment exacerbated his previous back injury, and also denied speaking with Peterson, whom Bryant described as a "FELA attorney" and "rainmaker." The Respondent's witnesses also concluded that because the Complainant had made inquiries about paid time off for back surgery before the derailment, he was seizing upon the occurrence of the derailment to fabricate a work-related injury and thus achieve his goal of paid leave to address pre-existing medical issues related to his back. The merits of these conclusions will be more fully addressed in the section addressing the Respondent's rebuttal to the Complainant's *prima facie* case. However, it is sufficient to note here that, even assuming that the Complainant did earlier express doubts concerning whether his injury was work-related, that he did inquire about paid time off prior to the derailment, and that he did not feel free to disclose to management that he had discussed matters with Peterson (if he did), none of these factors when viewed objectively amount to showing that the Claimant acted in anything less than good faith when he filed the injury report and stated: "I believe the Derail exag[g]erated a pre[-]existing condition that I had[.] But I can[']t Prove that it did." (CX 13).

Accordingly, I find that a preponderance of the evidence supports the Complainant's position, that he notified the Respondent of a work-related injury in good faith, and therefore engaged in protected activity as defined by the FRSA.

## 2. Respondent Was Aware of the Protected Behavior

The Complainant must next demonstrate that the Respondent was aware of his protected activities, such that they contributed to his termination. The fact that the Respondent was aware of his filing an injury report cannot be seriously argued.

### 3. Complainant Suffered An Unfavorable Personnel Action

The quintessential example of an adverse action is a tangible employment action such as the termination of the employment relationship. See *Burlington Indus., Inc. v. Ellen/i*, 524 U.S. 742, 761, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998); *Crady v. Liberty Nat. Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir. 1993). It is clear from the testimony and record that the Complainant suffered adverse employment action when he was pulled out of service and subsequently terminated from his employment with the Respondents on November 11, 2009.

### 4. Complainant's Protected Behavior Was A Contributing Factor In The Unfavorable Personnel Action

As the Complainant has established the first three elements of a *prima facie* claim of retaliation under the FRSA, the Complainant must next show that his protected behavior was a contributing factor in his termination.

In its comments to the Interim Final Rule, the Department of Labor, citing *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993), stated that it considered a "contributing factor" to be "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." The comments also cited to *Klopfenstein v. PCC Flow Techs Holdings, Inc.*, No. 04-149, 2006 WL 3246904 (ARB May 31, 2006). In that case the Board discussed the contributing-factor test under the whistleblower provisions of the Sarbanes Oxley Act of 2002. Specifically, quoting from *Klopfenstein*, the DOL observed that a Complainant need not necessarily prove that the respondent's articulated reason for the adverse job action was a pretext in order to prevail, but can alternatively prevail by showing that the respondent's reason, while true, "is only one of the reasons for its conduct...and that another reason was the complainant's protected activity." *Klopfenstein*, 2006 WL 3246904 at 13.

The DOL also made clear that although the National Transit Security Systems Act ("NTSSA") and AIR21 do not address a complainant's burden of proof that the protected activity was a contributing factor in the alleged adverse action, it was the Secretary's position that the complainant must demonstrate by a preponderance of the evidence that his or her protected activity contributed to the adverse action, and that otherwise the burden never shifts to the employer. A "preponderance of the evidence" means the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. §1201.56 (c)(2).

A complainant can sustain his or her burden through either direct or indirect evidence. *Sievers, supra*. Direct evidence is evidence that conclusively links the protected activity and the adverse action. *Id.* at 4-5. The ARB has described direct evidence as "smoking gun" evidence that "conclusively links the protected activity and the adverse action and does not rely on inference." *Williams v. Domino's Pizza*, ARE No. 09-092, slip op. at 6 (ARB Jan. 31, 2011). Alternatively, the complainant may rely upon circumstantial evidence. For example, the complainant may show that the respondent's proffered reason for termination was not the true reason, but instead "pretext." *Riess v. Nucor Corp.*, ARB 08-137, 2008-STA-OI 1, slip op. at 6 (ARB Nov. 30, 2010). If the complainant proves pretext, it may be inferred that his or her



protected activity contributed to the termination. *Id.* According to the Board, “If the complainant proves pretext, [the fact finder] may infer that his protected activity contributed to his termination, although [the fact finder is] not compelled to do so.” *Williams v. Domino ‘s Pizza, supra*, slip op. at 6. In evaluating the merits of the circumstantial evidence, courts may take into consideration the following factors: 1) timing of the unfavorable personnel action in relation to the protected activity; 2) disparate treatment of the complainant; 3) deviation from routine procedures; 4) attitude of supervisors towards the whistleblower and protected activity in general; and 5) the complainant’s work performance rating before and after engaging in protected activity. *Sievers, supra*, slip. Op. at 26.

Here, whether viewed as shown by direct or circumstantial evidence, the record clearly demonstrates that the Complainant’s filing of an injury report was at least a contributing factor, if not the determining factor, in his termination. The Complainant engaged in protected activity on September 9, 2009, when he went to Allen’s office and reported a work-related personal injury. Whatley testified that he requested to have the Complainant come in on September 10, 2009, to provide a statement because the information provided on the report was not nearly as comprehensive as the discussion that he had with the Complainant. (Tr. 246; JX 8 at page 167). Allen testified that he was present on September 10, 2009, when the Complainant came to the office and wrote a statement. (Tr. 297). Within a matter of days, the Complainant had been pulled from duty and suspended pending the outcome of an investigation. (Tr. 179). Shortly afterwards, the Complainant received an official letter from Respondent notifying him of the formal charge of rule violations.

The specific grounds for the dismissal were “dishonest representations and embellishment of facts and circumstances surrounding an on duty injury,” and “failure to honestly and timely make a report of injury on Form 52032 until September 9, 2009.” (JX 9). Clearly, the protected activity precipitated the unfavorable personnel action. The Respondent argues that although the filing of the report may have precipitated the dismissal, it was not its cause, and that the cause of the dismissal was the Respondent’s belief that the Complainant was dissembling and being dishonest by fabricating, after the fact, a link between the derailment and a pre-existing injury. However, as noted, the Secretary has made clear in the comments to the Interim Final Rule that a Complainant need not necessarily prove that the respondent’s articulated reason for the adverse job action was a pretext in order to prevail, but can alternatively prevail by showing that the respondent’s reason, while true, “is only one of the reasons for its conduct...and that another reason was the complainant’s protected activity.” *Klopfenstein, supra*, 2006 WL 3246904 at 13. Accordingly, it cannot reasonably be argued that, leaving aside the issue for now whether the Respondent’s reasons were pretextual, that the Complainant’s filing of the injury report was not “one of the reasons” for its conduct in dismissing the Complainant. It is clear from the record that if the Complainant had chosen not to file an injury report, he would never have been terminated.

I find, therefore, that clearly the Complainant’s filing of the injury report was one of the reasons for his dismissal, and therefore the Complainant has established a *prima facie* case of retaliation.

## 5. Same Adverse Action Absent Protected Behavior

Under § 1982.109 (b), relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior. 29 C.F.R. § 1982.109(b). In other words, even where a complainant has proven discrimination by a preponderance of the evidence, liability does not attach if the employer can demonstrate clearly and convincingly that it would have taken the same adverse action in any event. *Williams v. Domino 's Pizza, supra*, slip op. at 6. Clear and convincing evidence is “evidence indicating that the thing to be proved is highly probable or reasonably certain.” *Id.* (citing *Brune v. Horizon Air. Indus., Inc.*, ARE No. 04-037, AU No. 2002-AIR-008, slip. op. at 14 (ARB Jan. 31, 2006) (citing Black’s Law Dictionary at 577)). It is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. 5 C.F.R. § 1209.4 (d). Thus, the burden of proof under the clear-and-convincing standard is more rigorous than the preponderance-of-the-evidence standard. *DeFrancesco v. Union Railroad Co.*, ARE No. 10-114, AU No. 2009-FRS-9 (ARE Feb. 29, 2012).

The Respondent argues that the Complainant’s dismissal was not because he filed the report of injury, but the fact, in the Respondent’s view, that he did so with dishonest intentions. The Respondent’s witnesses, though, were unable to point to anything—not even a single statement—on the face of the injury report itself that was dishonest. To the contrary, the Complainant appears to have been quite candid in stating on the form that he thought the derailment exacerbated a pre-existing injury, although he could not, at least for the present, prove this to be the case. This statement is not the least bit dishonest or disingenuous. Rather, it is a very forthright statement of the Claimant’s state of mind, reflecting his conviction, which he could not yet prove, that the derailment had triggered a reoccurrence of the pain in his back which he had been experiencing during the month just concluded.

Nonetheless, the Complainant’s superiors judged the Complainant to be dishonest based on conversations they had had with him earlier in which he had allegedly expressed uncertainty whether there was a connection between the derailment and the reoccurrence of his back pain. Bryant, moreover, relied on Givens’s assertion that the Complainant had spoken with Peterson, whom he described disapprovingly as a “FELA attorney” and “rainmaker,” and the disparity between the conversations he had with Complainant, who allegedly denied speaking to Peterson. (Tr. 367-368). Both Bryant and Whatley also found suspicious that the Complainant had been inquiring, prior to the derailment, about getting paid for potential time off while undergoing surgery. (Tr. 378; 380). Accordingly, both Bryant and Whatley concluded that there was no merit in the Complainant’s claim of an injury arising from the derailment, and that the Complainant knew this to be the case but had still filed what he knew to be a false claim of a workplace injury, apparently after being advised to do so by Peterson.

When viewed objectively, however, the Respondent’s determination that the Claimant acted dishonest was based upon suspicion, as well as guilt by association, rather than hard evidence. As noted, the Complainant denied having ever spoken with Peterson. Even if Complainant had spoken with him, however, about his legal options under FELA, he was well within his rights to do so, and consulting an attorney is not tantamount to an attempt to commit

fraud. Furthermore, even if he had spoken with Peterson, the Complainant was under no obligation to disclose this fact, and the fact that Bryant would make such an inquiry, given his contemptuous attitude toward Peterson, could be seen as a form of intimidation. In this regard, it is noteworthy that the Respondent maintains a strict policy of requiring its employees to file a report of injury in the presence of a manager, which in itself could have a chilling effect. Bryant, moreover, did not hesitate to make clear that the purpose of requiring that the forms be filled out in the presence of a manager was to prevent employees from filling it out in consultation with an attorney. As he put it, if allowed to take the forms home and fill them out privately, the employees would “take them to their FELA attorneys, the FELA attorney would help them fill them out[,] and they would bring them back in and *here we go.*” (Tr. 342). (Emphasis supplied.)

Bryant’s statements, in this regard, lend significant credence to the testimony of the union representative, Givens, that the Respondent has a “mentality” that disfavors the reporting of injuries, and particularly injuries that become symptomatic only after the accident that caused them. (Tr. 93). He characterized normal practice as, “If you get hurt, don’t tell.” (Tr. 101). According to Givens, it is better not to report an injury if you can go home and walk it off or sleep it off, or take a pill. (*Id.*). In his view, the Respondent discourages the reporting of injuries because of the “hassle management has to go through to report it,” and to shield management from getting in trouble as a result of the injury. (Tr. 108). He testified that the Respondent particularly has no tolerance for the reporting of injuries which manifest themselves days after an accident, and that should an employee report an injury based on symptoms becoming manifest days afterward, the chances are that the employee will then be accused of filing a late report and terminated. (Tr. 110;112). This is apparently true despite the fact that Bryant, Whatley, and Orosco all acknowledged at the hearing that some injuries may take days to become symptomatic, and therefore an employee may not realize that he has suffered an injury until after the fact.

Proof of *animus* towards protected activity may be sufficient to demonstrate discriminatory motive. *See Sievers, supra*, slip op. at 27. “[R]idicule, open hostile actions or threatening statements,” may serve as circumstantial evidence of retaliation. *Timmons v. Mattingly Testing Services*, 1995-ERA-00040 (ARB June 21, 1996. I find that the facts and circumstances of this case reveal such an *animus*. According to Givens, when he informed Bryant that the Complainant was going to file an injury report, Bryant stated, “Well, we’ll see about that.” (Tr. 80). According to the Complainant, Bryant was upset and told him, “[You] probably opened up a can of worms and they’re going to fire [you].” (Tr. 141).<sup>6</sup> This is reinforced by Bryant’s own description of his conversation with the Complainant, “Well, I called [the Complainant] and ... I wasn’t in a real good mood...” (Tr. 33 9-340). Bryant specifically recalled saying “[Y]ou know, you’re reporting an injury here nearly two weeks after the fact” and “that you may in fact be opening a can of worms here that you don’t want to open.” (JX 8 at page 129). Bryant testified that he told the Complainant on September 8, 2009, that if the

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<sup>6</sup> At the hearing, Mr. Bryant testified that he did not remember saying to Complainant that by filing the Form 52032 Complainant would be opening up a can of worms. (Tr. 361-362). However, during the investigation in November 2009, Mr. Bryant specifically recalled saying “you know, you’re reporting an injury here nearly two weeks after the fact” and “that you may in fact be opening a can of worms here that you don’t want to open.” (JX 8 at page 129).

Complainant reported the injury it would be considered a late report and a violation of the rules which would be assessed a level 3. (Tr. 340; 362). As noted, according to Bryant, the reason employees have to fill out injury report forms in the presence of a manager is because otherwise a “FELA attorney would help them fill them out and they would help bring them back in and *here we go.*” (Tr. 342). (Emphasis supplied). As the trier of fact who observed Bryant testify, it was my distinct impression that Bryant was using the term “FELA attorney” in a pejorative sense, and his use of the phrase “here we go” was meant to suggest the pursuit of claims that are presumed by management to be frivolous. Also, according to the Complainant, when he tried to explain to Whatley that the derailment had made his pre-existing condition worse, Whatley’s response was to say, “Well[,] this sounds suspicious.” (Tr. 150- 151).

Respondent’s Rule 1.2.5 states that an employee is supposed to report an injury immediately once he or she becomes aware of it. (Tr. 93; JX 3). In practice, however, Givens stated that it is Respondent’s policy that, “you report it at the time of the accident or the hatchet comes out.” (Tr. 93). He testified that if an employee does have an injury, that he would recommend not getting any drugs for the injury so it does not become reportable. (Tr. 101). He explained that the Respondent has a duty to report an injury to the FRA if an employee gets some sort of narcotic or prescription medication. (Tr. 96; 101-102). Consequently, according to Givens, a lot of employees do not file an injury report despite suffering an injury while at work. (Tr. 89). Givens described the impact of such a policy as requiring employees to walk “a narrow line” and “report [an injury] right now or you’re gone.” (Tr. 89). Givens described the environment as one of intimidation and testified that people were afraid of losing their jobs over a minor injury. (Tr. 89). This is exactly the type of unsafe atmosphere of intimidation that the FRSA was designed to protect against.

Most revealing, and perhaps most disturbing, is the evidence concerning the alleged second Form 52032. The Complainant testified that he reported to Allen’s office on September 9, 2009, and filled out Form 52032 in front of Allen. (Tr. 145-146). He stated that prior to going to Allen’s office and filling out the two forms, he had spoken with Whatley. (Tr. 147; 148 JX 15; CX 1). According to the Complainant, he tried to explain to Whatley that the derailment had made his condition worse. (Tr. 151). The Complainant testified that he told Whatley, “S’jr, I’m saying that I believe that the injury exacerbated my condition I was having therapy for.” (Tr. 151). According to the Complainant, Whatley then told him that since he could not prove that the accident exacerbated his condition, he wanted the Complainant to state on the Form 52032 that he was not hurt on company property. (Tr. 151)

According to the Complainant, after completing and giving the Form 52032 to Allen in his office on September 9th, Allen handed the Complainant another blank Form 52032 along with the original Form 52032. (Tr. 146). He testified that Allen had highlighted sections of the original Form 52032, indicating those parts in which the Complainant’s responses would elicit an objection from Whatley. (Tr. 147; CX 14; JX 6A; JX 6B). Thus, according to the Complainant, despite his disagreement about where he suffered his injury, he felt compelled under the circumstances to comply with Allen’s instruction to leave blank the section on the second Form 52032 asking whether he was hurt on or off company property and the section asking about his condition and when he realized it was caused by his work. (Tr. 151-152, 159; JX 6A; CX4). According to the Complainant, after completing the second form, he crumpled up and threw the

rejected original in the waste basket next to Allen's desk, but later thought better of it and retrieved the crumpled form. (Tr. 156-157; 158). Allen, however, adamantly denied that he rejected any of the language inserted by the Complainant; rather, he testified that the Complainant only filled out one Form 52032 and further testified that he never pointed out any inadequacies on the form nor instructed the Complainant to fill out a second form. (Tr. 294-295; 296-297; 324; 329).

The sharp conflict between the testimony of the Complainant and Allen requires that I determine their credibility. Initially, I note that the degree of conflict is disturbing as both witnesses were placed under oath and acknowledged that they were under a duty to tell the truth. Obviously, though, if one was telling the truth, the other was engaging in a deliberate falsehood in violation of the oath they solemnly undertook. In assessing Allen's demeanor at the hearing, I found him to be very well mannered and respectful and apparently sincere in his testimony. However, the Complaint submitted what he identified as the Form 52032 that he retrieved the waste basket. (TX 6B; CX 14). The form is in the original, i.e., not a photocopy, and has the appearance of being wadded up and then flattened. On this particular Form 52032, which is signed and dated by the Complainant on September 9, 2009, the Complainant checked off boxes under Section II to indicate that he was injured "ON DUTY" and "ON COMPANY PROPERTY." Yellow highlighter is used to mark the number (8), which precedes the checked boxes. In the Form that both parties agree was the form that was officially accepted by Allen, however, both these boxes are now left blank. (JX 6A; CX 4).

As noted, Allen testified, under oath, that the Complainant only completed one Form 52032 and that he never pointed out inadequacies on the original Form 52032. Yet, there are clear markings of yellow highlighter on the Form 52032 on the corresponding sections the Complainant asserts Allen pointed to as those to which Whatley would take exception. Allen testified that his recollection of the events surrounding this incident "is not that great." (Tr. 319). Allen further stated that he could not recall that he had any real significant discussion with the Complainant concerning the contents of Form 52032. (Tr. 329). The highlighted sections on the crumpled Form 52032 support the Complainant's version of events. As the trier of fact, I found the Complainant to be honest, and I believed his testimony. I am convinced that the crumpled Form 52032, or the Complainant's Exhibit 14, is the form he originally filled out on September 9, 2009, and which was rejected by Allen and then crumpled and thrown into the waste basket, only to be later retrieved by the Complainant.

I also find the disparities that Bryant perceived in the Claimant's version of events to be non-compelling evidence of the Complainant acting dishonestly. As regards to the Claimant inquiring about paid leave to address his pre-existing back issues, Whatley conceded that it was a legitimate concern for a person who may be facing a significant amount of time off for medical reasons to make inquiries concerning paid leave. (Tr. 270).

Even assuming, however, that the timing of the Complainant's inquiries concerning paid time off may have given reasonable grounds for suspicion, neither Bryant nor Whatley could point to anything that the Complainant did or said that could be labeled, in fact, dishonest. As noted by counsel for the Complainant in his cross-examination of Whatley, the letter charging the Complainant with dishonesty specifically accused him of making "dishonest representations"

and engaging in “embellishment of facts.” (JX 9; Tr. 261). Asked where such representations and embellishments could be found, Whatley rather haplessly referred to the report of injury. Counsel for the Complainant then tried to identify the particular fact that the Complainant was alleged to have misrepresented or embellished in the report of injury.

Q. The fact that he told you he thought he was hurt in the derailment, but he couldn't prove it?

A. No, the fact that he filled out that report to that effect saying he was hurt.

(Tr. 261). At that point, the undersigned asked specifically for Whatley to identify where he perceived the Complainant's dishonesty. Whatley replied, “We perceived the dishonesty based on the conversation that I had with him versus what he put on his report.” (*Id.*). That answer prompted the following exchange between counsel for the Complainant and Whatley.

Q. What I want to know then is what did he tell you in his conversation with you that he didn't put in his report?

A. He indicated that he wasn't sure where the injury occurred and that he couldn't be sure that it happened on the property.

Q. All right and I think he put somewhere either in his statement or in his report that he wasn't 100 percent sure, but he believed it did?

A. Right.

Q. Do you recall that?

A. I do.

Q. All right and you believed that he was lying to you at that point?

A. I look at that as just walking around the same issue. By virtue of the fact that he filled out the report, he was reporting an injury.

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Q. Okay and I think what you're saying, I want to make sure I understand it, is that you don't believe [the Complainant] was honest when he filled his report out, the 52032, correct?

A. That's correct.

Q. All right. Tell me what on the report do you think is dishonest?

A. I think the report itself is dishonest.

(Tr. 262-263).

If the Complainant had attempted to conceal his pre-existing injury, significantly misstated his medical history, or lied about the derailment, the Respondent may have had some evidence upon which to base a charge of dishonesty. However, ultimately all the Respondent had was, as Bryant aptly described it, a “feeling of dishonesty.” (Tr. 366). A “feeling of dishonesty,” however, does not amount to clear and convincing evidence of dishonesty. When pressed, neither Bryant nor Whatley could actually point to a single clear misrepresentation or embellishment of fact committed by the Complainant. Moreover, having considered all the evidence of record, I am convinced that this “feeling of dishonesty” did not arise from an impartial weighing of the facts, but, rather unhappiness with the Complainant for filing the report of injury. There is no evidence that Whatley ever even paused to consider the medical merit of

the Complainant's claim that he was injured in the derailment.<sup>7</sup> Indeed, the decision to terminate Bryant was so peremptory that it preceded the development of any expert medical opinion regarding the cause of the Complainant's injury. Bryant testified that the Complainant had a good work record and had no discipline prior to his termination (Tr. 361). Thus, there does not appear anything in the Complainant's work history which would have otherwise given the Respondent cause to question his honesty except for a "mentality," as Givens described it, that disfavors the filing of an injury report—and that brings "the hatchet out" when an employee does.

I find, therefore, that the Complainant has proven by a preponderance of the evidence that he engaged in protected activity when he reported a work-related personal injury; that the Respondent knew that he had engaged in the protected activity; and that he was subjected to an unfavorable personnel action when he was terminated. Furthermore, I find that his engaging in the protected activity was at least one reason, if not the primary reason, for his termination. I therefore find that his protected activity was a contributing factor in the unfavorable personnel action. Conversely, I find that the Respondent has failed to demonstrate by clear and convincing evidence that the Complainant would have been terminated absent his protected activity. In sum, I find that the evidence of record demonstrates that the Complainant's protected activity was the true reason for his termination and that he would not have been terminated had he not filed a report of injury.

## REMEDIES

A successful complainant is entitled to be made whole under the FRSA. 49 U.S.C. § 20109(e)(1). The FRSA further provides for "compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees." § 20109(e)(2)(C). Though not explicitly stated in the FRSA, the Board has found that damages for emotional distress are available under language identical to § 20109(e)(2)(C). *See Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-00047, PDF at 7-8 (ARB Aug. 21, 2011) (interpreting 49 U.S.C. § 31105(b)(3)(A)(iii)); *see also Mercier v. Union Pac. R.R. Co.*, ARB Nos. 09-101, -121, ALJ Nos. 2008-FRS-00003, 4, PDF at 8 (ARB Sept. 29, 2011) (noting complainant may seek damages for mental hardship under the Act). Punitive damages up to \$250,000 are also authorized. § 20109(e)(3).

The Complainant is entitled to back pay with interest under the FRSA. 49 U.S.C. § 20109(e)(2)(B). The Secretary found that the Complainant was pulled out of service on September 10, 2009, and was off work from September 10, 2009, to August 5, 2010, for a total of 330 days, or 10 months and 27 days. Due to his surgery, however, the Complainant was not able to work from October 2, 2009, until November 17, 2009, the date upon which Dr. Seale certified that he was able to return to full normal work. Because there has been no determination that this was a work-related injury, and that issue is not before me, it will be assumed that the Complainant was not entitled to any paid time off for the surgery. The record also demonstrates

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<sup>7</sup> It should be noted that nothing in this decision should be construed as opinion on the medical evidence. There is no indication that the medical evidence played any role in the Complainant's termination; most of it was, in fact, generated after the decision to terminate.

that during this period the Complainant temporarily obtained other employment in 2010. Specifically, the Complainant worked for Pollution Management, Inc., in 2010, and earned total wages of \$11,012.56. (CX P. Hg. 1). The Complainant submitted W-2 Forms which show earnings of \$93,321.25 in 2008; \$44,383.87 in 2009; and \$31,895.37 in 2010. (CX 5).

The Complainant asserts that he is entitled to back wages of \$52,327. (Compl. Br. at 22). To arrive at this figure, the Complainant approximates his 2009 earnings as \$66,576. He reasons that his 2009 earnings of \$44,384 represent approximately two-thirds of the work year, and therefore, by extrapolation, he would have earned \$66,576 for a full year. Somewhat inexplicably, however, he then subtracts his *net* 2010 earnings from Pollution Management, Inc., or \$8,701.24, from his full projected 2009 earnings, and arrives at a total amount of back wages of \$52,327.00. This calculation, however, besides subtracting 2010 wages from 2009 wages, also ignores the fact that the Complainant was off work from the railroad, and thus deprived of earning higher wages, from January 1, 2010, to August 11, 2010.<sup>8</sup> In sum, the Complainant appears to be shortchanging himself.

I find that the more appropriate means of calculating back wages is to first take the Complainant's 2009 earnings of \$44,384 and divide them by the number of weeks he worked, which, using an end date of September 10th, was 36 weeks. Dividing \$44,384 by 36, the Complainant was earning approximately \$1,232.89 per week from the Respondent in 2009. This means that for the 16 weeks he was out of work at the railroad, he would have earned an additional \$19,726.24. However, as noted, the Complainant elected to have surgery on his back while he was out of work in 2009, so from October 2, 2009, until he was certified by Dr. Seale to be able to return to work on November, 17, 2009, a total of seven weeks, he would not have had any wages (or at least the record does not show that he would have had any wages). Consequently, \$8,630.23 (7 X \$1,232.89) must be subtracted from \$19,726.24, for a total amount of lost wages in 2009 of \$11,096.01.

Using somewhat the same methodology, only with days rather than weeks, the Claimant earned \$31,895.37 from the Respondent in 2010, for work from August 11, 2010, the day that the Claimant testified that he returned to work, to December 31, 2010. (Tr. 182). August 11th is the 223rd day of the year, which means that the Claimant worked 142 days in 2010, and therefore the Claimant earned approximately \$224.62 for every day in 2010 that he was on the payroll (\$31,895.37 divided by 142). For a full year on the payroll, therefore, by extrapolation, he would have earned \$81,986.30. From this amount, however, must be subtracted his gross 2010 earnings from Pollution Management, Inc., or \$11,012.56. This leaves a total amount of lost wages for 2010 as \$70,973.74.

The Complainant is therefore entitled to back wages totaling \$82,069.75. Prejudgment interest is to be paid for the period following the Complainant's suspension on September 11, 2009, until the date of this Decision and Order. Post-judgment interest is to be paid thereafter, until the date of payment of back pay is made.

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<sup>8</sup> Although the investigation below found that the Complainant had returned to work on August 5, 2011, the Complainant testified that he returned to worked on August 11, 2010. (Tr. 182).



The Complainant seeks additional compensatory damages of \$110,000 for pain and suffering, or, more specifically, for what he describes as “mental anguish and upset” during the 11 months he was out of work at the railroad. A complainant must prove compensatory damages by a preponderance of the evidence. *Ferguson*, ARB No. 10-075, PDF at 7. An award is “warranted only when a sufficient causal connection exists between the statutory violation and the alleged injury.” *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 938 (5th Cir. 1996).

The Complainant did not submit any corroborating evidence of medical or psychological treatment to support an award for emotional harm or mental anguish. A complainant’s credible testimony alone, however, is sufficient to establish emotional distress. *Id.* at 7-8; *see also Simon v. Sancken Trucking Co.*, ARB Nos. 06-039, -088, ALJ No. 2005-STA-00040 (ARB Nov. 30, 2007). Here, the Complainant did not present any testimony regarding his own emotional harm or mental anguish. He testified that his immediate reaction to notice of his dismissal was disbelief, but beyond that he did not testify as to his emotional state during the period that he was out of work. (Tr. 182). The only testimony regarding the Complainant’s mental state during this period was elicited from his wife, Lori Griebel. Griebel testified that her husband “loved the railroad” and his job was the job he had “dreamed of” and “always wanted” and worked hard to maintain. (Tr. 62). She testified that that “he just couldn’t believe that this was happening to him,” and that that when he learned of his dismissal “[y]ou’d of thought that somebody kicked him in the gut.” (Tr. 62-63). She described him as being “devastated.” (Tr. 63).

According to Griebel, she worked as a substitute teacher and homemaker. (Tr. 63). She testified that she and the Complainant had two girls, ages 12 and 9, and that during his period of dismissal from the Respondent, the couple found it impossible to afford health insurance for her and the girls. (*Id.*). She testified that the Complainant began searching for work immediately after his dismissal, and that he found the process of filling out applications for work discouraging because the forms would require him to put the reason why he left his previous work, and that he would have to say that he was fired. (Tr. 64). She testified that the Complainant finally found work through their Sunday school teacher, who was a prominent businessman and knew the owner of Pollution Management, Inc. (Tr. 65). She testified, however, that the Complainant’s earnings from Pollution Management did not approach those from the Respondent and they were unable to “make ends meet.” (Tr. 66). She testified that the Complainant was the sole provider during this period and “had to carry the weight of everything on his shoulders.” (*Id.*).

While I found Griebel’s testimony credible, it is not extensive, and after a complete review of the record I find that the evidence of emotional harm, or mental anguish or upset, is insufficient to support anything more than a nominal damages. While clearly being found guilty of dishonesty and losing one’s dream job under disgrace would cause emotional distress, the Complainant simply did not present evidence with the specificity required to justify more than a nominal damage award. There was, for example, no evidence of sleeplessness, anxiety, extreme stress, depression, marital strain, loss of self-esteem, excessive fatigue, or a nervous breakdown. Furthermore, there was no evidence of physical manifestations such as ulcers, gastrointestinal disorders, headaches, or panic attacks. While one does not wish any of these things on anyone, they are the usual physical manifestations of severe emotional harm. Without them, there is inadequate evidence of specific discernible injury to the Complainant’s emotional state.

Clearly, though, the Complainant did suffer some emotional harm, mental anguish, and distress. Consequently, I find that the Complainant is entitled to \$5,000 in nominal damages for such damages.

To make the Complainant whole, moreover, he is entitled to have his disciplinary record expunged of any reference to the charges arising from the filing of the injury report, including his suspension and termination. The Complainant is further entitled to be reinstated with the same seniority status that he would have had but for the discrimination. 49 U.S.C. § 20109(e)(2)(A).

The Complainant seeks an additional \$1,475.00 to compensate him for health insurance monthly premiums for himself during the time that he was off work from the Respondent. Although Griebel testified that they could not afford health insurance for her and the girls during the period of the Complainant's dismissal, she testified that because her husband was going to undergo surgery for his back, they maintained his health insurance. She testified that the couple made an initial catch-up payment of \$300.00 in November 2009, and then paid \$100.00 a month for the first six months, and \$175.00 for the months thereafter. (Tr. 63-64). However, there is insufficient evidence of what medical insurance the Complainant was entitled to while in the Respondent's employ in order to determine the exact of damages, and therefore I find that the Complainant has not proven these damages with the required degree of specificity.

The Complainant seeks punitive damages as permitted by the FRSA. Punitive damages are to punish unlawful conduct and to deter its repetition. *BMW v. Gore*, 517 U.S. 559, 568 (1996). Relevant factors when determining whether to assess punitive damages and in what amount include: (1) the degree of the defendant's reprehensibility or culpability; (2) the relationship between the penalty and the harm to the victim caused by the respondent's actions; and (3) the sanctions imposed in other cases for comparable misconduct. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 523 U.S. 424, 434-35 (2001). Punitive damages are appropriate for cases involving "reckless or callous disregard for the [complainant's] rights, as well as intentional violations of federal law . . . ." *Smith v. Wade*, 461 U.S. 30, 51 (1983), *quoted in Ferguson*, ARB No. 10-075, PDF at 8-9. The Administrative Review Board further requires that an ALJ weigh whether punitive damages are required to deter further violations of the statute and consider whether the illegal behavior reflected corporate policy. *Ferguson*, ARB No. 10-075, PDF at 8.

The Complainant argues that he is entitled to the full amount of punitive damages, \$250,000.00, because the evidence makes clear that he was first discouraged from filing an injury report, and then coerced in Allen's office to report the injury not as an on-duty injury. He argues further that the conduct of the principals in this case should be "evaluated in light of its past conduct," and he refers to Givens's testimony that 70% of employees who report an injury are subjected to discipline. Furthermore, he points to the fact that Whatley was unfamiliar with the medical aspects of his condition and could not identify "any actual dishonest statements" or "any facts embellished" by him despite the charge that he had done both. In the Complainant's view, the Respondent "bootstrapped what ordinarily would have been a level 3 discipline into a level 5 discipline" in order to retaliate against him for filing an injury report. Indeed, he charges that the Respondent retaliated against him "as a means of intimidation to discourage [the]

Complainant and other employees from reporting injuries in the future.” The Complainant describes this as a “blatant attempt to interfere with protected activity,” requiring that the Respondent be punished to discourage it from engaging in similar conduct in the future.

I find these arguments in favor of an award of punitive damages compelling. It is clear to me from the record that the Respondent does continue to have a mentality that discourages the filing of an injury report, and meets those that are filed with suspicion and mistrust. Moreover, it is clear that as a matter of policy, the Respondent disfavors its employees consulting with a “FELA attorney” prior to the filing of an injury report, and has actually taken steps to make sure that the report of injury is not filled out in consultation with an attorney. Moreover, should the employee be discovered to have met with a “FELA attorney,” that employee runs the risk of being perceived as colluding in fraudulent behavior. Even worse, in this case, the Complainant when preparing his report of injury was not allowed to fill out the report with the injury reported as an on-duty injury, but was, in fact, compelled to submit a second report deleting the reference to an on-duty injury. Then, two days after filing the injury report in a manner acceptable to management, he was pulled from service and charged with dishonesty based upon suspicion rather than hard evidence. Were it not for the intervention of the Public Law Board, the Complainant would still be discharged from the Respondent to this day.

I find that such conduct by the Respondent is sufficiently egregious to warrant an award of punitive damages. As a matter of policy, moreover, it does not appear that the Respondent in its course of investigation at any time gave appropriate heed to the fact that the filing of an injury report is a statutorily-protected right, and therefore any adverse action taken in response to the filing should be one taken carefully and with cognizance of that fact that the employee’s activity is protected from retaliation. Here, as I have previously noted, rather than treading carefully in an area of protected activity involving the Complainant’s rights, the Respondent appears to have rushed to judgment regarding the merits of the Complainant’s injury claim, prejudging its medical merits and arriving at the conclusion that it was an act of dishonesty without any real hard evidence to that effect, but only suspicion and guilt by association, the latter of which arose from the fact that the Respondent believed that he had consulted with Peterson, a “FELA attorney” and “rainmaker.” This is particularly egregious given the Complainant’s good work record and the absence of any prior discipline. The record does not demonstrate that the Respondent ever had a company attorney review the case to determine whether the Complainant’s legal rights under the FRSA were being properly observed, or the possible ramifications of its actions in dismissing the Complainant. Thus, it does not appear that the Complainant’s case is unique or will be the last of its kind under current policies. Therefore, an award of punitive damages would also be appropriate to deter future misconduct.

I have surveyed the award of punitive damages in other FRSA cases, ranging from \$25,000 to the full \$250,000, but it would be disingenuous to suggest that one case is like another. Each case presents its own unique circumstances. Although the facts of this case are disturbing, they are not the worst example of retaliation. It was my impression that the Respondent believed its actions justified under its own procedures, but was betrayed by its own prejudices into failing to perceive the retaliatory nature of its conduct. It was also my impression from Orosco’s testimony that the Respondent’s policies are not set in stone, and that the company does have a genuine interest in both safety and procedural fairness to its employees.

While these are mitigating factors, they do not excuse the manner in which the Complainant was treated here as a result of his protected behavior. Nor do they in any way justify the more egregious aspects of this case, including what I believe transpired in Allen's office when the Complainant went to file his report of injury. Moreover, it is apparent from Givens's testimony that the Respondent's policies, as applied, have created a work environment in which other employees are loathe to report an injury, creating an issue of safety and striking at the heart of the FRSA's protections. Therefore, I find an award of \$100,000, still less than half the allowable amount, is appropriate in this case.

### **ATTORNEY FEES AND COSTS**

The Complainant is entitled to reasonable costs, expenses and attorney fees incurred in connection with the prosecution of his complaint. 49 U.S.C. § 20109(e)(2)(C). Counsel for Complainant has not submitted a fee petition detailing the work performed, the time spent on such work or his hourly rate for performing such work. Therefore, Counsel for Complainant is granted twenty (20) days from the date of this Decision and Order within which to file and serve a fully supported application for fees, costs and expenses. Thereafter, Respondent shall have twenty (20) days from receipt of the application within which to file any opposition thereto.

### **ORDER**

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Although reinstated by the Public Law Board, the Respondent shall insure that the Complainant is receiving the same pay, terms and privileges of employment that he would have received had he not been terminated.
2. The Respondent shall expunge from the employment records of the Complainant any adverse or derogatory reference to his protected activities of September 9, 2009, as well as his discriminatory termination.
3. The Respondent will pay the Complainant \$82,069.75 in back pay, with both pre- and post-judgment interest.
4. The Respondent will pay the Complainant \$5,000 for emotional harm.

5. The Respondent will pay the Complainant \$100,000 in punitive damages.
  
6. Counsel for the Complainant shall have twenty (20) days from the date of the Decision and Order within which to file a fully supported application for fees, costs and expenses. Thereafter, Respondent shall have twenty (20) days from receipt of the fee application within which to file any opposition thereto

**SO ORDERED.**

JOHN P. SELLERS, III  
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 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).