U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)

Issue Date: 12 February 2015

CASE NO.: 2011-FRS-00039

In the Matter of:

TOMMY LEE HARVEY,

Complainant,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

Appearances: Ryan Otis, Esq.
Anthony Petru, Esq.
For the Complainant

Fred Wilson, Esq.
Leland Willis, Esq.
For the Respondent

Before: Jennifer Gee
Administrative Law Judge

DECISION AND ORDER

INTRODUCTION

This matter arises out of the employee-protection provisions of the Federal Rail Safety Act ("FRSA" or "the Act"), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-053, 121 Stat. 266, 444 (2007) and Section 419 of the Rail Safety Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848, 4892 (2008). 49 U.S.C. § 20109 (Supp. 2011). The implementing regulations appear at Part 1982 of Title 29 of the Code of Federal Regulations. The FRSA prohibits an employer from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee for engaging in certain protected activities, which include an employee's lawful and good faith notification, or attempt at notification, to the railroad carrier of a work-related personal injury or work-related illness. 49 U.S.C. § 20109(a)(4).

Tommy Lee Harvey ("Complainant") alleges that his former employer, Union Pacific Railroad Company ("Respondent" or "Union Pacific"), violated the whistleblower protections of the FRSA by conducting a disciplinary investigation and then terminating his employment on August 14, 2009, in retaliation for his filing of an injury report and notifying managers of a locomotive defect. It was initiated with the Office of Administrative Law Judges ("OALJ") on September 19, 2011, when the OALJ received Respondent's timely objections to the Occupational Safety and Health Administration's ("OSHA") findings in favor of Complainant. The case is before me *de novo*.

For the reasons stated below, I find that Complainant has established that his injury report was a contributing factor in Respondent's adverse actions against him and that Respondent has failed to establish that it would have taken the same actions regardless of Complainant's protected activity. Consequently, I find that Respondent violated the FRSA, and Complainant's claims for compensatory emotional distress damages and punitive damages are GRANTED as detailed below.

My findings are based on a complete review and consideration of the relevant arguments of the parties, evidence submitted, applicable statutory provisions, regulations, and precedent. Although not every exhibit in the record is discussed below, the entire record was carefully considered in arriving at this decision. Where applicable and as laid forth below, I have made credibility determinations concerning the testimony.

PROCEDURAL BACKGROUND

The Complainant filed his initial complaint with the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA") on February 8, 2010, alleging that Respondent harassed and then terminated Complainant for engaging in protected activity—specifically, for reporting in good faith on June 17, 2009, that he had suffered an on-duty injury to his back and hip on April 19, 2009, and that there was a defect on board his locomotive. (ALJX 1.)[1] He contended that Respondent was motivated by the risk of a Federal Employers Liability Act ("FELA") claim and by the reporting requirements of the Federal Railroad Administration ("FRA") to discipline Complainant for filing an injury report. (ALJX 1.) On August 22, 2011, OSHA completed its investigation and the Secretary of Labor, through her agent, the Assistant Regional Administrator of OSHA, found reasonable cause to believe that Respondent had violated the FRSA, and accordingly awarded Complainant damages of $75,000 for pain and suffering, $12,250 for attorney fees, and $150,000 in punitive damages. (ALJX 2.)[2] On September 19, 2011, the Respondent timely appealed the Secretary's findings, requesting a hearing before an administrative law judge. (ALJX 3.)[3]

On July 16, 2012, after several continuances, I issued an order setting this matter for hearing on October 9, 2012, in Tucson, Arizona. (Notice of Hearing Location, July 16, 2012.) On August 7, 2012, Respondent filed a motion for summary decision, and on August 27, 2012, the Claimant submitted his response. In addition, the U.S. Department of Labor Office of the Solicitor submitted an amicus curiae brief on August 22, 2012, in support of the Claimant's

[1] "ALJX 1" refers to ALJ Exhibit 1. It is Complainant's Complaint.
[2] "ALJX 2" refers to ALJ Exhibit 2. It is the Secretary's Findings.
[3] "ALJX 3" refers to ALJ Exhibit 3. It is Respondent's Request for Hearing.

opposition. On August 27, 2012, I issued an order denying Respondent's motion for summary decision.

On October 2, 2012, I conducted a pre-hearing conference call during which the parties agreed to a series of issues and stipulations in this case which are set forth below. On the same day, I issued an order summarizing the agreed-upon issues and stipulations. (Order Summarizing Pre-Hearing Conference, October 2, 2012.)[4]

The hearing took place over two days, beginning on October 9, 2012, and concluding on October 10, 2012, in Tucson, Arizona. The Complainant, his counsel, and counsel for the Respondent, all appeared and participated at the hearing, and all parties were afforded a full opportunity to present testimony and offer documentary evidence. At the beginning of the hearing I admitted into the record Joint Exhibits ("JX") 1–41 and 43-44. (HT, pp. 13–16.) During the remainder of the hearing, I admitted ALJ Exhibits ("ALJX") 1-3, Complainant's Exhibit ("CX") 1, Respondent's Exhibit ("RX") 1, and JX 47. (HT, pp. 165, 286, 499.) I excluded JX 42, Complainant's personnel file, and JX 45, the "shopping history" of logged defect reports and repairs made to the locomotive involved in this case, on the grounds that they were not used during the investigation of Complainant which culminated in his termination. (HT, pp. 7–10, 407.) At the end of the hearing, JX 46 was withdrawn. (HT, p. 513.)

The Complainant's and Respondent's Closing Briefs were timely received on December 14, 2012, and December 17, 2012, respectively. Complainant submitted a timely reply brief on December 28, 2012, and Respondent timely filed a reply brief on December 31, 2012. Complainant also submitted a supplemental reply brief on January 2, 2013, to notify me of a newly issued ARB decision relevant to Complainant's argument that a railroad's notice of investigation can independently qualify as an adverse action under the FRSA regardless of whether or what discipline ensues from the investigation.

ISSUES

The issues to be decided are:

1. Whether Complainant engaged in an activity protected by § 20109(a)(4) of the FRSA;
2. Whether Complainant suffered an adverse action by Respondent;
3. If Complainant engaged in a protected activity and suffered and adverse action, whether that protected activity was a contributing factor in Respondent's decision to take the adverse action;
4. Whether Respondent would have discharged the Complainant absent his protected activity; and

[4] Complainant also filed a separate FELA lawsuit regarding both the injury at issue in this FRSA case and an additional later injury. In that case, he claimed he was medically disabled and unable to return to work as an engineer. In settlement of the FELA claim on October 4, 2012, Complainant received damages for lost wages and benefits. (RX 1; HT, pp. 494–95.)

5. Whether the Complainant is entitled to relief under the FRSA, and, if so, the appropriate measure of relief.[5]

(Order Summarizing Pre-Hearing Conference (Oct. 2, 2012), p. 1.)

STIPULATIONS[6]

The parties have agreed to the following stipulations:

1. Respondent Union Pacific Railroad Company is a railroad carrier within the meaning of the FRSA and is engaged in the business of line-haul freight operations throughout the United States; therefore, it is engaged in interstate commerce within the meaning of the FRSA.
2. The Complainant, Tommy Lee Harvey, was employed by the Respondent as an Engineer assigned to the Transportation Department, and was therefore an employee covered under the FRSA.
3. On June 17, 2009, the Complainant reported an injury that he suffered on April 18, 2009.[7]
4. The Complainant reported that he slipped on ice that was on the cab steps of a locomotive on April 18, 2009.[8]
5. The Respondent conducted a formal disciplinary investigation hearing regarding the Complainant's injury report on August 5, 2009, in Tucson, Arizona.
6. Following the investigation hearing, Respondent imposed a Level 5 discipline and terminated the Complainant on August 14, 2009.
7. Complainant appealed his dismissal through his union as part of the applicable bargaining agreement.[9]
8. Respondent reinstated the Complainant on November 27, 2009, with full back pay and discipline imposed at Level 3 for filing a late injury report.
9. The Complainant's Level 3 discipline was a five-day suspension.
10. Respondent issued a letter on November 27, 2009, ordering the Claimant reinstated with full back pay, exclusive of a 5 day suspension for filing a late report.

---

[5] Although Complainant initially requested reinstatement and damages for lost wages, back pay, and loss of earning capacity, he has since stipulated that he is no longer seeking these categories of damages because they were part of his separate FELA case that was settled. (ALJX 1, p. 4 (demands of initial complaint); HT, p. 496.)

[6] With the exception of Stipulation No. 12, these stipulations were memorialized in my October 2, 2012, Order Summarizing Pre-Hearing Conference, and some were again reiterated in the parties' closing briefs.

[7] Technically, Complainant was injured in the early morning hours of April 19, 2009, while he was working the overnight shift from April 18, 2009, to April 19, 2009. (HT, p. 258.)

[8] It is true that April 18, 2009, is the date which Complainant reported (*see* JX 1), but the actual date of injury was April 19, 2009. (HT, p. 258.)

[9] Respondent's Closing Brief, p. 6; Complainant's Reply Brief, p. 7.

11. The Complainant timely filed a complaint with the U.S. Department of Labor Occupational Safety and Health Administration on February 8, 2010, alleging that he had been retaliated against for engaging in protected activities.

12. On August 22, 2011, the Secretary of Labor issued findings that the Complainant suffered an adverse action in violation of the FRSA and awarded compensatory damages, attorney fees, and punitive damages among other relief.

13. On September 16, 2011, the Respondent timely filed objections to the Secretary's Findings and requested a hearing before the Office of Administrative Law Judges.

14. As of the date of the hearing, October 9–10, 2012, Complainant was permanently medically disqualified from being able to return to his work as a locomotive engineer. He could not and would not be returning to that position.[10]

FACTUAL BACKGROUND

Union Pacific's Organization, Policies, and Procedures

Organizational Hierarchy and Managers of Union Pacific

A number of Respondent's managers were involved in the events at issue in this case. At the time of the events in this case, Kenneth Hunt was the Regional Vice President of the Western Region for Union Pacific. (HT, p. 30.) The Regional Vice President is the highest-ranking territorial officer that Union Pacific has in the area. (HT, pp. 30–31.) As Regional Vice President, Mr. Hunt had to approve the discipline that was assessed against Complainant. (HT, p. 31–32.) Working under the Regional Vice President are various superintendents that are responsible for the transportation department. The transportation department is responsible for the employees who move the trains. (HT, p. 31.)

During the events at issue in this case, Andy Yedlick was the superintendent of the Tucson and El Paso service units, including Complainant's division. (HT, pp. 31, 94.) As a superintendent, Mr. Yedlick reported to Mr. Hunt. Michael Stebens was the Director of Road Operations for Union Pacific at the time of the events in this case, and in this capacity, he reported directly to Mr. Yedlick. (HT, p. 190.) As Director of Road Operations, Mr. Stebens would normally be involved in investigations. (HT, p. 191.) Mr. Stebens does not recall whether he was involved in the decision to charge Complainant, but he testified that he was not involved with the investigation, though he normally would have been. (HT, p. 191.)

David Nevil, Lewis Tovar, and William Thurman were the managers involved on the day Complainant reported his injury. Complainant reported his injury to Mr. Nevil and Mr. Tovar, and they called Mr. Thurman on the phone. (HT, pp. 373, 434.) At the time of the events in this case, Mr. Tovar and Mr. Nevil were both managers of yard operations for Union Pacific (Lewis Tovar was still in training). (HT, pp. 231, 433–34.) Mr. Thurman was the Director of Terminal

[10] HT, p. 494.

Operations in Tucson. (HT, pp. 372–73.) His position is directly below the superintendent's. (HT, p. 373.) As part of his job, he helps with investigations by reviewing and determining the rules that are applicable to each case. (HT, pp. 375–76.)

Samuel Lopez, Sr. and Lawrence Carpio were the main Union Pacific employees involved in Complainant's investigation. Mr. Lopez is the Senior Manager of Terminal Operations in Tucson, Arizona, and held that position in 2009 as well. (HT, pp. 291–92.) Mr. Lopez was the charging officer in Complainant's case and was responsible for gathering and offering evidence to prove the charges. (HT, p. 292.) Mr. Carpio is a Manager of Road Operations with Union Pacific and at the time of this hearing, had held that position for about 7 years. (HT, p. 346.) In this role, he conducts investigations and acts as a charging officer. (HT, p. 347.) As a conducting officer, Mr. Carpio shows up for the investigation, has a job briefing and a safety briefing, and ensures that all of the questions and answers are on the record. (HT, p. 348.) He is also responsible for making sure the investigation proceeds in a controlled manner, collecting the testimony and exhibits, making sure witnesses and principals' rights are protected, and ruling on objections. (HT, pp. 348–49.)

Mr. Tamisiea and Mr. Reilly became involved in Complainant's case after Complainant's investigation and termination. Frank Tamisiea has been the Director of Labor Relations for Union Pacific since 1994. (HT, p. 135.) One of his responsibilities is to review disciplinary records after discipline has been issued. (HT, p. 138.) Though he is not the primary designated representative for discipline cases, he does sometimes get involved. (HT, p. 138.) James Reilly has been the Assistant Director for Labor Relations for Union Pacific for 7 years, and has worked in Labor Relations for Union Pacific for 12 years. (HT, pp. 165–66.) Rene Orosco also works in labor relations, as the General Director of Labor Relations, but he was not involved in Complainant's investigation or termination in any way. (HT, p. 409.)

Union Pacific's Training Regarding Whistleblower Protections

Union Pacific's managers have varying levels of understanding of whistleblower law. The general consensus among the managers is that they have "been conferenced" on the FRSA's whistleblower protections, and they understand "a little bit about it," but not much detail.[11] Several of Union Pacific's managers recall being given an OSHA fact sheet about whistleblower protections, but do not recall being asked to read it.[12] Nonetheless, Mr. Hunt says that there are "a lot of conversations" between Union Pacific's law department and managers regarding whistleblower law, and Mr. Hunt ensures that his subordinates receive whistleblower training as well. (HT, p. 75.)

When asked directly, Union Pacific's managers appeared to have a minimal understanding of whistleblower law, but not much substantive knowledge. Some of Union

[11] Mr. Hunt testified that the management at Union Pacific has "been conferenced" on the whistleblower protections contained within the FRSA, and they understand "a little bit about it and not that much in detail." (HT, p. 50.) Mr. Thurman testified that he has a "very minimal" understanding of whistleblower law. (HT, p. 383.) Mr. Orosco also testified that he did not know many specific details of whistleblower law, but only that the "focus is on retaliation." (HT, p. 424.)

[12] Mr. Yedlick testified that he has seen the OSHA fact sheet but does not remember if Union Pacific instructed him to read it. (HT, p. 121.)

Pacific's managers testified that Union Pacific's policy is that retaliation against whistleblowers who report injuries "would not be tolerated."[13] Nonetheless, several managers did not know the law's key terms, such as "protected activity."[14] Several managers testified that they are familiar with the most basic elements of the law; for example, Mr. Yedlick, Mr. Stebens, and Mr. Reilly testified that they knew it was illegal for Union Pacific to terminate an employee for reporting a hazardous safety condition or injury. (HT, pp. 122, 177, 247.) However, most managers were unfamiliar with the history, background, or purpose of the FRSA, including some whose main responsibilities include dealing with labor-related policies or employee discipline. Most notably, Mr. Tamisiea, the Director of Labor Relations, testified that he was not entirely familiar with the FRSA and its history.[15] Mr. Carpio, who regularly conducts investigations and acts as a charging officer, testified that he has never read a Public Law Board decision to research what is required of investigations.[16] (HT, pp. 360–61.) Mr. Orosco, the General Director of Labor Relations, testified that he has a "very minimal" understanding of whistleblower law and that he has not read any whistleblower law or its legislative history. (HT, pp. 424–25.)

It is also unclear as to when Union Pacific began training its staff on whistleblower law. Mr. Tamisiea also testified that he trained about whistleblower law during a quarterly labor relations staff meeting, but this training did not take place until approximately one year before the October 2012 hearing in this case. (HT, pp. 161–62.) As of 2009 and 2010, when the events of this case were occurring, Mr. Tamisiea had not been trained on the law. (HT, p. 162.) Mr. Stebens testified that he "first learned a little bit about the [w]histleblower [laws]" during August of 2012. (HT, pp. 197–98.)

Part of Union Pacific's training includes memos and documents circulated to its managers. On February 27, 2009, a memo was sent to all operating department management employees entitled "Employee Personal Injury Response." (JX 28.) This memo outlined procedural guidelines for handling employee injuries in order to maintain in compliance with the Federal Rail Safety Act. (JX 28, p. 1.) Attached to the memo were direct quotations from the FRSA Reporting Guide, annotated with comments from Union Pacific. (JX 28, pp. 2–3.) On February 28, 2011, a follow-up memo was sent to the same employees with the same information. (JX 29.)

Union Pacific also publishes "Ethics Bulletins" to "help employees understand business conduct requirements." (JX 27, p. 1.) These bulletins "feature an actual policy violation or example of an existing policy and state the consequences and governing rule or policies." (JX 27, p. 1.) One of Union Pacific's Ethics Bulletins describes a scenario wherein an injured employee was discouraged from completing an accident report and from seeking medical treatment, which ultimately resulted in an FRA investigation. (JX 27, p. 1.) The Ethics Bulletin

[13] Mr. Hunt testified as such. (HT, p. 79.) Mr. Yedlick also stated that there is a "[z]ero tolerance" policy at Union Pacific towards retaliating against an employee who reports an injury, defect, or safety hazard. (HT, p. 131.)

[14] Mr. Hunt testified that at the time of the events of this case, he was not aware that reporting an injury or reporting defective equipment qualified as protected activities. (HT, pp. 50–51.) Mr. Yedlick testified that he had never heard the phrase "protected activity" before. (HT, p. 121.)

[15] At the hearing, after Complainant's counsel directed several questions to Mr. Tamisiea regarding the history of the FRSA and Respondent's counsel objected, I stated, "I think this witness has made it clear that he's not familiar with the history of the FRSA and I think you've made your point on that score." (HT, p. 161.)

[16] The Public Law Board is the appellate body that handles appeals from investigative hearings.

goes on to explain that "[a]ny manager or supervisor who consciously jeopardizes an injured employee's ability to obtain appropriate medical care will be subject to discipline up to and including dismissal." (JX 27, p. 1.) Another Ethics Bulletin describes a whistleblower case wherein an Amtrak employee filed a complaint with OSHA alleging that Amtrak suspended the employee for reporting a work-related injury, which resulted in OSHA ordering Amtrak to pay damages under the FRSA. (JX 27, p. 4.) The bulletin later states that "managers should ensure that personnel actions are not discriminatory or retaliatory." (JX 27, p. 4.)

Investigation and Discipline Procedures

Union Pacific's investigation and discipline procedures are governed by a variety of sources, including internal Union Pacific policies, the National Railroad Adjustment Board, and an agreement between Union Pacific and the Brotherhood of Locomotive Engineers ("BLET"). The National Railroad Adjustment Board states, "The investigation procedures are guaranteed, by the carrier, that it will deal impartially with the employee, in accordance with commonly accepted standards of fairness." (HT, p. 350.) In addition, the agreement between Union Pacific and the BLET outlines several procedures for discipline and investigations. (HT, p. 166.) It requires a notice of investigation to be sent to the employee within a prescribed time period, and an investigation to be conducted within a certain time period after that. (HT, pp. 166–67.) Once the investigation is held, the railroad must make a determination about the rules violations that were charged, a decision that is usually made by the superintendent. (HT, p. 167.) The BLET can then appeal those findings if it chooses to. (HT, p. 167.) Appeals are heard by a three-member panel of the Public Law Board, including one member from the carrier, one from the union, and one neutral member. (HT, p. 167.) Decisions rendered by the Public Law Board are final and cannot be appealed. (HT, p. 168.)

Prior to an employee being charged with an offense that could result in termination, the Regional Vice President must approve the charges. (HT, p. 31.) Union Pacific does not require that the Regional Vice President read the investigation transcript before deciding to charge an employee with a terminable offense or approve that employee's termination. (HT, p. 42.) In determining whether to charge an employee, Mr. Hunt testified that he considers the employee's length of service. (HT, p. 36.) He does not consider the potential psychological and emotional effects on the employee of having to go through an investigation. (HT, pp. 37–38.)

During an investigation, Union Pacific's charging officer requests witnesses. (HT, p. 292.) Most managers acknowledge that Union Pacific is responsible for bringing all relevant witnesses and evidence to thoroughly develop the facts during an investigation.[17] In conducting an investigation, Union Pacific has the ability to direct employees to attend the investigative

[17] According to Mr. Hunt, it is "reasonable" to consider it Union Pacific's responsibility to bring to the investigation all of the various items of evidence and testimony that would be necessary to thoroughly develop the facts. (HT, p. 38.) Mr. Lopez acknowledged that it is important for Union Pacific to gather all of the facts, do an exhaustive search, and bring all of the relevant evidence to the investigation hearing. (HT, p. 292.) Mr. Carpio claimed the object of the investigation is to gather as many facts and documents as necessary to ensure that both the accused employee and the railroad have all of the requisite evidence in the record in order to determine whether there has been a rule violation. (HT, p. 349.) Mr. Carpio further testified that the hearing should be conducted in a fair and impartial manner with both sides given an opportunity to present, see, and hear all of the evidence, and that the carrier will present all of the facts, including those which favor and are adverse to the Complainant. (HT, p. 351.)

hearing as witnesses. (HT, pp. 40, 293.) If Union Pacific brings a witness, the railroad compensates the employee for the time spent testifying. (HT, p. 371.) However, the union does not have the power to compel a witness to attend absent cooperation from Union Pacific. (HT, p. 371.) The agreement between Union Pacific and the BLET provides, in relevant part:

> "The engineer being investigated, or the BLE representative, may request the carrier to direct a witness to attend an investigation, provided sufficient advance notice is given, as well as a description of the testimony the witness would be expected to provide. If the carrier declines to call the witness, and the witness attends at the request of the engineer or BLE, and provides relevant testimony, which would not, otherwise, have been in the record, the carrier will compensate the witness, as if it had directed the witness to attend."

(HT, pp. 343–344; JX 6, p. 222.)

Rules and Policies at Union Pacific

The General Code of Operating Regulations ("GCOR") contains Union Pacific's rules and regulations. (HT, p. 135.) In addition to the GCOR, other rules and regulations governing railroad operations include Air Brake and Train Handling Rules ("ABTH"), System Safety Instructions, time tables unique to each territory, superintendent bulletins, manager bulletins, and federal regulations. (HT, pp. 135–137.) The main Union Pacific rules that are relevant to this case are GCOR Rules 1.2.5, 1.40, and 1.6.

Rule 1.2.5 pertains to late reporting of an accident or injury. (HT, p. 141; JX 19, p. 1.) It is not a terminable offense. (HT, p. 141.) Rule 1.2.5, in relevant part, states: "All cases of personal injury, while on duty or on company property, must be immediately reported to the proper manager and the prescribed form completed." (JX 6, p. 26; JX 1, p. 1.) Mr. Hunt says that Union Pacific encourages employees to turn in accident reports because "that's the only way [they] can figure out what events happen, to prevent the next injury from happening." (HT, p. 79.)

Seemingly in contrast to Mr. Hunt's testimony that Union Pacific encourages injury reporting, Mr. Hunt also testified that regardless of the context or circumstances, an employee will be investigated and disciplined for turning in a late injury report. (HT, pp. 55–57.) He further explained that when incidents are reported, the investigation is not into the injury, but into the rule violation or activity surrounding the incident. (HT, pp. 80–81.) In addition, one of the ways that managers of Union Pacific are evaluated is by the number of injuries reported on their territory, and a greater number of reported injuries could adversely affect a manager's bonus. (HT, pp. 57, 118, 243–44, 315–16, 336–37, 361–63; JX 23.) In the past, managers have dissuaded employees from turning in reportable injuries, and have been reprimanded as a result. (HT, pp. 58–59.) A few managers testified that they are aware that some Union Pacific employees are afraid to turn in injury reports because they subsequently "have a target on their back" or are subject to harassment or discipline.[18] (HT, pp. 52–53, 115, 159.)

[18] Mr. Hunt testified that he is aware that some employees who report injuries subsequently "have a target on their back," but he does not believe it to be a problem. (HT, pp. 52–53.) Similarly, Mr. Yedlick testified that he is aware

Rule 1.40 applies to reporting engine defects. (JX 21.) The rule states, "The engineer will report any engine defect on the proper form and notify the relieving engineer, when needed," but does not specify the proper form. (HT, pp. 63–64.) Rule 1.40 is not a terminating offense. (HT, p. 141.) Rule 1.40 does not require an employee to call a manager or dispatcher to report the defect. (HT, pp. 99–100.)

Rule 1.6 relates to negligence. (HT, p. 99; JX 20.) It is a catch-all rule called "conduct." (HT, p. 142; JX 20.) There are several elements to Rule 1.6. (JX 20.) Rule 1.6 states, "Employees must not be careless of the safety of themselves or others, negligent, insubordinate, dishonest, immoral, quarrelsome, or discourteous. Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated." (HT, p. 142; JX 6, pp. 24–25; JX 20.) Union Pacific defines "careless of safety" as "[w]hen an employee's actions demonstrate an inability or an unwillingness to comply with safety rules as evidences by repeated safety rules infractions" or "when a specific rule[s] infraction demonstrates a willful, flagrant, or reckless disregard for the safety of themselves, other employees, or the public." (JX 32, p. 15.) "Negligent" is defined as behaviors or actions causing or contributing to "the harm or risk of harm to the employee, other employees, the general public, or company property." (JX 32, p. 16.)

Union Pacific's policy on accident, incident, injury, and illness reporting states that "Union Pacific will not tolerate harassment or intimidation of any person that is calculated to discourage or prevent such person from receiving proper medical treatment or from reporting an accident, incident, injury, or illness." (JX 26, p. 1.) The policy also outlines procedures for addressing alleged violation of the harassment and intimidation policy. (JX 26, p. 1.)

Union Pacific has an "upgrade policy" that is considered "a whole new approach to the way [Union Pacific] look[s] at discipline" in that it is more "positive" than the traditional discipline policies. (HT, pp. 414–15; JX 32, p. 17.) This policy was created in the late 1980s after a survey demonstrating that Union Pacific's employees were displeased with Union Pacific's discipline policy. (HT, pp. 415–16.) Specifically, Union Pacific sought to improve the consistency of the discipline system, communication with employees about which charges would be assessed against them, and focus on training and education rather than punishment. (HT, pp. 416–18.) With these goals in mind, Union Pacific came up with the progressive table of discipline, and Mr. Orosco testified that he believes the policy achieved their initial goals. (HT, pp. 418–19.) This policy basically provides a standardized, uniform table to be used in assessing the appropriate level of discipline to be assessed, based on the severity of the current charge and the employee's history of disciplinary violations. (JX 32, p. 17.)

---

that some people feel that the railroad unjustly goes after employees that have been injured, and Mr. Tamisiea stated that he has heard that employees believe they will be subject to harassment or discipline for reporting injuries. (HT, pp. 115, 159.)

Complainant's Background and Employment with Union Pacific

Complainant's Family Life

At the time of the hearing, Complainant had been married to his wife for 25 years. They did not have any children together, but Complainant's wife has 4 children. (HT, p. 272.) Around the time of the incident in this case, Complainant had a "heavy plate" with regard to his family life. (HT, p. 278.) In the spring of 2009, Complainant's wife began having headaches, double vision, impaired vision, and fainting. (HT, p. 271.) It took several evaluations and visits to multiple doctors to diagnose her condition, but eventually the doctors determined that she had a tumor on her brain. (HT, p. 272.) If the tumor went untreated, Complainant's wife could have gone blind, become paralyzed, or died. (HT, p. 272.) She underwent surgery in June 2009 to remove the tumor from her brain, and her pituitary gland was also removed. (HT, pp. 277–78; 473–74.) There were complications from the surgery and Complainant's wife is on a lot of medications to deal with the side effects of having her pituitary gland removed. (HT, p. 474.)

Complainant also lives with his stepdaughter and is largely responsible for her care. (HT, p. 273.) Complainant's stepdaughter was diagnosed with meningitis as an infant, and as a consequence, has spinal myelopathy. (HT, p. 273.) This condition required her to have a shunt put in to drain water from her brain. (HT, p. 273.) As a result, Complainant's stepdaughter has suffered developmental and learning delays and requires ongoing care to manage the condition. (HT, p. 274.) She is unable to work and depends on Complainant for financial assistance and medical insurance. (HT, pp. 274–75.)

Complainant's Employment with Union Pacific

As of 2009, the Complainant had worked for Union Pacific for approximately 32 years. (HT, p. 254.) Initially, Complainant worked as a trainman, conductor, switchman, and CRO operator for Union Pacific, and he became a locomotive engineer in March 1995. (HT, p. 254.) When Complainant became a locomotive engineer, he was trained on how to report engineering defects, and told to place the defect on a locomotive card. (HT, p. 254.) Specifically, he was told "that you fill out the tag and you report the defect to the outbound crew." (HT, p. 256.) Then the tag "is placed on the isolation switch of the lead locomotive. And if it's a trailing unit, it's, also, placed on the trailing unit." (HT, p. 256.)

Timeline of Events at Issue in this Case

Complainant's Injury on April 19, 2009

On April 19, 2009, Complainant was working as a locomotive engineer on a run between El Paso, Texas and Tucson, Arizona. (HT, p. 258.) Complainant went on duty sometime on April 18, around 5:35 p.m., with John D. Foster, a conductor whom he had worked with many times before. (HT, p. 258.) Before starting his shift, Complainant did the required inspection of the locomotive. (HT, pp. 488–90.) Sometime around 12:30 or 1:30 a.m. on April 19, 2009, when the train was near Bowie, Complainant began walking down some steps, and as he stepped with his right foot, he slipped, "became airborne," and came down on his back, skin, and forearm, and landed in a pool of ice and water. (HT, pp. 261, 270.) Complainant states that he was "sort of contorted, twisted up, because as [his] leg went up in the air, [his] left leg came behind and [he]

came down on it." (HT, p. 262.) Mr. Foster asked Complainant if he was hurt, and Complainant responded, "I think I'm good." (HT, p. 262.) At the time, Complainant did not feel any broken bones and thought that he would be okay. (HT, p. 262.) Mr. Foster continued to ask whether Complainant was hurt, and Complainant said that he just needed to sit for a minute, but he thought he was alright. (HT, p. 262.) After a few minutes, Mr. Foster helped the Complainant stand up, and at that point he could see that there was ice on both steps and on the bottom of the platform. (HT, p. 263.) He noticed that the ice box door was slightly ajar. (HT, p. 263.)

Complainant went back to his seat in the cab, and Mr. Foster cleaned up the water and ice. (HT, p. 264.) Mr. Foster concluded, and later told Complainant, that there was too much ice in the refrigerator and that the door had opened, causing the ice and water to spill out onto the floor. (HT, pp. 265–66.) Mr. Foster taped up the refrigerator with duct tape and put a fluorescent orange tag on to draw attention to the defect. (HT, pp. 268–69.) Shortly after his accident, Complainant filled out a bad order tag and put it on the isolation switch in the locomotive. (HT, pp. 60, 266–67; JX 6, p. 151.) Complainant did this because the first thing each engineer looks for when he boards the locomotive is the isolation switch. (HT, p. 267.) Once a bad order tag is placed on a piece of equipment, it cannot be removed by any employee other than the correcting employee. (HT, pp. 145, 308.) Because all engineers have to read bad order tags, Complainant's action would effectively tell every engineer and anyone else who worked on that locomotive that there was a defect on the refrigerator. (HT, pp. 60–61.)

When the locomotive arrived in Tucson, Complainant and Mr. Foster met with the outbound crew and told them that the fridge was defective, and that Mr. Foster had taped it up. (HT, pp. 267–68.) Complainant stated that he told the outbound crew this information because Rule 1.40 "require[s] that you let the engineer know." (HT, p. 268.) Complainant also entered the fact that the refrigerator was defective into the computer; he tried to print a copy of this, but the printer was out of paper, which Complainant states "happens a lot."[19] (HT, p. 269.) After Complainant told the outbound crew that the refrigerator could not be used, Complainant recalls that they got a bucket and filled it with ice and went on their way. (HT, p. 268.)

Complainant's Submission of an Injury Report

At first, Complainant did not believe he was injured, but eventually it became apparent that he had "more than just a sore back" and Complainant believed something was wrong and that he may have suffered an injury. (HT, pp. 447–48.) One day, in June 2009, when he was walking into a restaurant, Complainant had a "sharp, excruciating pain" from his back to his left leg to the point that he had to lay down on the ground to relieve the pain and pressure. (HT, p. 448.) At that point, Complainant decided that if his back was still bothering him upon his return to Tucson, he would report it. (HT, p. 448.) In addition to not being aware that he was injured, Complainant was fearful that if he reported his injury, he could lose his job, because Union Pacific "has a long reputation of terminating employees" who fill out accident reports. (HT, pp.

[19] Complainant also described other problems he has had inputting information into the computer, such as an incident sometime around 2007 where the Complainant entered into the computer that his speedometer was defective, but the company said the information was never put in. (HT, p. 270.) According to Complainant, his general chairman eventually retrieved the information and confirmed that he had entered it into the computer. (HT, p. 270.)

448–49.) Complainant recalled several specific instances where Union Pacific investigated, charged, or terminated employees who filed injury or accident reports.[20]

On June 17, 2009, Complainant went into the yard office that was shared by Mr. Tovar and Mr. Nevil and reported that he had been injured. (HT, pp. 231,434, 452; JX 1.) Complainant initially did not want to make a verbal report of how he had been injured, but instead wanted to fill out an accident report and give a handwritten statement. (HT, pp. 235, 439.) The Complainant felt the Union Pacific officers are "unbelievable" and "can't remember anything." (HT, p. 453.) Complainant felt that he would be "better off talking to [the] wall" than telling a Union Pacific officer what happened verbally because it is "just a waste of time." (HT, p. 453.) Mr. Tovar and Mr. Nevil, however, wanted Complainant to verbally explain the incident to them. (HT, pp. 454–55.) Complainant, Mr. Tovar, and Mr. Nevil went back and forth about this for about ten minutes. (HT, pp. 236–37.) Complainant stated that Mr. Nevil "pretty much went ballistic," "shouting" that he could not give Complainant an accident report or take him to the hospital until Complainant verbally explained what had happened. (HT, pp. 452–53.) Mr. Tovar corroborated this by confirming that the conversation was "heated." (HT, pp. 436–37.) Mr. Nevil, on the other hand, testified that the conversation did not get heated and no one became upset. (HT, pp. 236–37.)

After this conversation, Mr. Nevil called Mr. Thurman to tell him that Complainant was reporting an injury, and reported to Mr. Thurman that Complainant was not being forthright and would not tell him what happened. (HT, pp. 237, 373, 390–91.) Mr. Thurman told Mr. Nevil to call back using speakerphone so that they could both speak with Complainant.[21] (HT, pp. 237–38, 373.) Complainant told the officers briefly that in April 2009 he fell on the stairs of the locomotive because he slipped on some ice or water. (HT, pp. 373, 459.) At this time, Mr. Thurman already believed Complainant to be guilty of rules violations for late reporting and carelessness for the safety of himself and others. (HT, pp. 374–75.) Mr. Thurman told the Complainant that Mr. Foster was going to be fired because he witnessed the accident and had a duty to report it. (HT, p. 460.) When Complainant tried to defend Mr. Foster, Mr. Thurman allegedly responded, "It doesn't make a difference. We're going to fire somebody. We're going to have an investigation and we're going to fire somebody." (HT, p. 460.) After this call ended, Complainant began writing out his statement of events, and Mr. Nevil signed it when the Complainant finished writing. (HT, p. 239; JX 2.) After Complainant finished writing his accident report and was in the process of writing his handwritten statement, Mr. Lopez arrived and took over the process. (HT, p. 241.) Mr. Tovar was also in the room during this entire time, and eventually took Complainant to the hospital before Complainant was able to complete his statement. (HT, pp. 241; 438, 463–65.) That same day, Mr. Nevil sent an e-mail to Mr. Yedlick, Mr. Thurman, Mr. Stebens, and Mr. Lopez to inform them of Complainant's injury. (HT, p. 242; JX 3.) Two days later, on June 19, 2009, Mr. Lopez sent an e-mail to Mr. Yedlick, Mr. Nevil, Mr. Stebens, and Mr. Thurman regarding the incident, stating that he had contacted Mr. Foster about the incident and summarizing Mr. Foster's version of events. (JX 4.)

[20] The Complainant reported that an engineer in his class was in a vehicle accident, sought medical attention, and was later terminated as a result. (HT, p. 450.) Complainant also mentioned two other Union Pacific employees who were terminated for filing reports. (HT, p. 451.)

[21] The Complainant denies that this call took place on speakerphone. (HT, p. 457.) Complainant alleges that this conversation took place on a regular phone, and that after saying that Mr. Foster would be fired, Mr. Thurman called back on a company line and asked to be placed on speakerphone. (HT, p. 461.)

When Mr. Lopez first heard about the injury, he inquired as to whether Complainant was at the hospital being treated. (HT, pp. 317–18.) After confirming that Complainant was at the hospital, he instructed another employee, Chris Moore, to go to the hospital and relieve Mr. Tovar because they were unsure as to when Complainant would be released. (HT, p. 318.) At this point, Mr. Tovar's involvement in the situation ended. (HT, pp. 441–42.) Mr. Lopez then waited at the office until Complainant and Ms. Moore returned. (HT, p. 318.) Complainant was at the hospital for a few hours and left around 8:30 a.m. (HT, p. 466.) When Complainant returned from the hospital, Mr. Lopez asked him to finish filling out some portions of the injury report and asked him what happened and why he had not reported it sooner. (HT, pp. 318, 467–71.) Mr. Lopez also asked Complainant to provide a urine sample. (HT, p. 467.) Mr. Lopez asked Complainant a series of questions about the incident and took notes on a notepad. (HT, pp. 469–70.) Mr. Lopez stated that the Complainant explained that he "had slipped on the steps and had just scraped his elbow, and he thought he was going to be okay. He had been self-medicating at home." (HT, pp. 318–19.) Mr. Lopez testified that he was concerned that a locomotive with defective equipment had been traveling the country for nearly two months without Union Pacific's knowledge. (HT, p. 319.) Mr. Lopez "tried to look into some repair records or some referral maintenance records," and could not find anything regarding the refrigerator on the locomotive. (HT, p. 319.) He also contacted the roundhouse foreman and asked him to look into maintenance records for the locomotive, and he was unable to find any reports of the defective refrigerator. (HT, pp. 319–20.)

After Complainant met with Mr. Lopez, he met with Mr. Smith, a claims agent. (HT, p. 472.) Complainant told Mr. Smith that he had provided a written statement and had nothing to discuss with him. (HT, p. 472.) Mr. Smith was "a little upset" but told Complainant to contact him if he had anything further to say. (HT, p. 472.) After this conversation, Complainant went to the pharmacy to fill his prescriptions and then went home. (HT, pp. 472–73.)

After Mr. Thurman learned of the defective refrigerator, he told Mr. Nevil to trace the locomotive, find out where it was, and determine whether any repairs had been made. (HT, p. 392.) Mr. Thurman testified that Mr. Nevil completed these tasks, a fact that he knew based on "further follow-up conversation, throughout the course of the week" with Mr. Nevil and Mr. Lopez. (HT, p. 394.) When the locomotive was found and examined, Mr. Thurman "heard that there [were] no repairs needed." (HT, p. 395.) When asked about the possibility that there were no repairs needed because the repairs had already been made, Mr. Thurman responded that due to federal laws, if any repairs had been done, there would have been a record of them, and the fact that there was no record of repairs means that they were never done. (HT, p. 395.) When further asked about whether this could indicate that perhaps no repairs were ever necessary, Mr. Thurman acknowledged that it was possible. (HT, pp. 395–96.)

Union Pacific's Decision to Investigate

Mr. Yedlick decided to initiate an investigation of Complainant's conduct. When Mr. Yedlick decided to initiate the investigation, he did not have any information from Complainant regarding an injury or locomotive report. (HT, p. 113.) The charge letter was issued based on a conversation Mr. Yedlick had with either Mr. Lopez or Mr. Stebens. (HT, p. 113.) While he acknowledges that he could have done more investigation prior to issuing a charge letter, such as looking for other records, tracking down witnesses, or looking at the accident report, Mr. Yedlick

chose not to. (HT, pp. 114–15.) Prior to issuing the charge letter, Mr. Lopez knew that Complainant and Mr. Harvey had notified the relieving crew about problems with the refrigerator, but chose to issue a charge letter anyway.[22] (HT, pp. 304–06.)

Mr. Thurman had a discussion with Mr. Yedlick and Mr. Lopez about charging Complainant with rules violations. (HT, p. 375.) Though Mr. Lopez issued the charge letter, he was "just following orders." (HT, pp. 331–32.) Mr. Hunt approved the investigation into Complainant's report and the decision to charge Complainant with a terminable offense. (HT, pp. 31–32.) Mr. Hunt made the decision to approve the investigation after he "had a discussion with Mr. Yedlick" regarding Complainant's "very late reporting of an incident." (HT, p. 32.)

On June 24, 2009, Complainant received a letter from Union Pacific advising him that he was being investigated for possible violations of Rules 1.6 [negligence], 1.2.5 [late reporting of an injury], and "any other applicable rules that may be brought up during the investigation," and that if found to be in violation, he could be dismissed from Union Pacific. (JX 5.) The letter advised him to attend the investigation on July 3, 2009.[23] (JX 5.) When Complainant received the charge letter in this case, he felt "devastated," "shocked," and "worried." (HT, p. 476.) Complainant testified that he knew from his experience with Union Pacific that the railroad does not send out a charge letter unless it is serious about acting on the charges, and he was concerned about losing his job in the midst of his wife's and stepdaughter's medical issues. (HT, p. 476.)

Most managers who were involved in the decision to investigate Complainant testified that Union Pacific's primary concern in deciding to charge the Complainant with a terminable offense was the fact that there was a locomotive traveling the country with a defect that Union Pacific was not made aware of for nearly two months.[24] Mr. Stebens appointed Mr. Carpio to serve as the conducting officer for the investigation. (HT, p. 357.) On July 7, 2009, Complainant sent a letter to Mr. Lopez requesting that 8 witnesses and 18 documents or categories of documents be produced at the hearing. (CX 1.)

Union Pacific's Investigation

The investigation was held on August 5, 2009. (JX 6.) Vince Verna, local chairman of the Brotherhood of Locomotive Engineers and Trainmen, appeared on behalf of Complainant, and Gary Crest, local chairman of the United Transportation Union, appeared on behalf of Mr. Foster, who was being investigated for a violation of Rule 1.6 for failing to report a defective locomotive. (JX 6, pp. 2; 19.) Mr. Carpio presided over the investigation, and Mr. Lopez acted as the charging officer and company witness. (JX 6, pp. 2–3.) During one of the breaks, Mr. Carpio noticed that Mr. Verna had been tape recording the proceedings, and Mr. Carpio instructed Mr. Verna to turn off the recorder. (JX 6, pp. 44–47.)

[22] Though Mr. Lopez issued the charge letter, it was a decision made primarily by Mr. Yedlick and Mr. Lopez stated that he was "just following orders." (HT, pp. 331–32.)

[23] The investigation was subsequently postponed multiple times. (JX 6, pp. 16–22.)

[24] Mr. Hunt testified, "At that point in time, we had no idea where the locomotive was. And it put a potential risk to everyone else that had handled the locomotive." (HT, p. 32.) Mr. Yedlick testified that he was concerned because an unreported locomotive defect can be "very hazardous." (HT, pp. 100–01.) Mr. Lopez claimed that one of the primary reasons he decided to investigate Complainant was because "all the employees on the Union Pacific, plus any other employees from another railroad that would have been on this locomotive could have gotten hurt." (HT, p. 324.)

The only witness Mr. Lopez called to testify was Mr. Lopez himself. (HT, p. 293; JX 6, pp. 51, 57, 61.) The transcript of Union Pacific's investigation consists mostly of various letters and documents being read into the record, Mr. Lopez testifying about the incident at issue from his perspective, and Complainant and Mr. Foster testifying. (JX 6.) Though Mr. Lopez acknowledged that he could have called the relieving crew to testify, brought locomotive defect records or repair records, or introduced other exhibits, he chose not to. (HT, pp. 299–306.) Mr. Lopez introduced Complainant's written statement, but no other exhibits. (HT, p. 293.) Similarly, As the conducting officer, Mr. Carpio had the right to suspend the investigation if he determined that additional witnesses or documents needed to be produced in order to assure a fair and impartial investigation, but he chose not to. (HT, p. 358.) Mr. Carpio kept notes during the investigation but shredded them afterwards because he "[doesn't] need them." (HT, p. 364.) The only information Mr. Carpio recalled from the investigation was that Complainant brought a pillow with him because his back was hurting, that the investigation was held off-site, and that it was a long investigation. (HT, p. 364.)

Mr. Verna, on behalf of Complainant, made several objections at the investigation hearing. (JX 6, pp. 52–53.) Specifically, at the beginning of the investigation, Mr. Verna objected that the date of incident specified on the charge letter was incorrect, that the charges in the charge letter were not specific, and that the charge of "any other rules that may be brought up in the investigation" was too vague. (JX 6, pp. 52–53.) Later in the investigation, Mr. Verna objected that Mr. Nevil was not called as a witness despite the testimony about Mr. Nevil taking Complainant's statement. (JX 6, pp. 63–66.) When Mr. Carpio offered to have Mr. Nevil testify by phone, Complainant objected that he did not have notice of Mr. Nevil's testimony. (JX 6, p. 66.) Complainant also objected that the notice was "deficient and defective in form," contained material errors, and not specific enough. (JX 6, p. 54.) Finally, Complainant objected that Mr. Carpio allowed Mr. Verna's and Mr. Lopez's letters to be read into the record, but did not read Complainant's letter to the superintendent into the record. (JX 6, p. 55.) All of these objections were "noted" by Mr. Carpio. (JX 6, pp. 52–57.)

Mr. Crest made several objections on behalf of Mr. Foster. Mr. Foster was charged with violating Rule 1.6, "and any other applicable rules that may be brought up during the investigation." (JX 6, p. 42.) Mr. Crest objected to the latter charge as being "extremely vague," explaining, "We have a fundamental right to know the charges that the employee is charged with. We have a right to be able to put together a defense for those charges. And the way that that is written into the charge letter, there is no way that we could possibly be able to prepare a defense for a rule book that is hundreds of pages." (JX 6, p. 42.)

Complainant requested that several witnesses be called to the investigation, but they were not called. (HT, pp. 300–07; JX 6, pp. 47–49.) Mr. Lopez testified that he received an e-mail regarding witnesses from Complainant's union representative, Mr. Verna, and replied "letting him know that [Mr. Lopez] wasn't going to have any witnesses and when [he] did get the documents, [he] would send them." (HT, p. 332.) Mr. Lopez also told Mr. Verna that he did not plan to call any witnesses, including the ones Mr. Verna had requested via e-mail. (HT, p. 344.) During the investigation, Complainant's letter requesting witnesses and documents was read into the record and Mr. Lopez acknowledged that he received it. (JX 6, p. 49.) Other Union Pacific managers later testified that they were aware of Complainant's request for witnesses and

documents.[25] Mr. Yedlick did not direct Mr. Lopez to produce any witnesses or documents at the investigation hearing. (HT, pp. 131–32.) When asked about this, Mr. Hunt stated that he did not believe that Union Pacific should have done anything to ensure that these witnesses were called. (HT, pp. 64–65.)

The following exhibits were entered or read into the record during the investigation: Union Pacific's notice of investigation; three notices of postponement; a subsequent notice of investigation; Union Pacific rules 1.6, 1.40, and 1.2.5; Mr. Verna's request to postpone the investigation; a letter from Mr. Verna to Mr. Lopez reminding Union Pacific of Complainant's request for witnesses and documents; Mr. Lopez's response stating that Union Pacific had no witnesses and would furnish documents at a later time; Complainant's handwritten version of events; the agreement between Union Pacific and the unions regarding discipline procedures; a copy of a bad order tag; and Complainant's injury report. (JX 6, pp. 208–27.)

During the closing arguments of Union Pacific's investigation, Mr. Verna argued on behalf of Complainant that there were procedural and substantive defects to the investigation. (JX 6, p. 180.) Specifically, Mr. Verna objected that: he was instructed to turn off his audio recorder despite technical difficulties with Union Pacific's audio recorder; Union Pacific did not tender documents that were used as exhibits to Complainant until after the hearing started despite Complainant's earlier request for them; the charges were "overly broad"; Mr. Carpio refused to allow Complainant's request for documents and witnesses; no witnesses were called to testify at the investigation; and there was a lack of evidence to support charges against the Complainant. (JX 6, pp. 180–82.) Complainant also gave a closing statement where he argued that the proceedings were fundamentally unfair due to deficient notice, vague charges, and a lack of evidence. (JX 6, pp. 182–206.)

Most of the managers testified at the hearing before me that they believed Union Pacific should conduct a fair and impartial investigation by calling all relevant witnesses and producing all relevant documents. Mr. Yedlick stated that he believes that any pertinent exculpatory evidence should be presented at an investigation hearing. (HT, p. 107.) Mr. Tamisiea opined that Union Pacific "should have ordered the witnesses that had pertinent facts to the case." (HT, p. 149.) Mr. Stebens stated that "Union Pacific has an obligation to conduct a fair and impartial hearing," an obligation which includes producing all relevant documentary evidence and witnesses, whether the evidence supports or defeats the charge. (HT, p. 192.) Mr. Stebens testified that if there is evidence that could defeat a charge, it would be the conducting officer's obligation "to allow that evidence into the hearing, if he knows it exists." (HT, p. 193.) On the other hand, though he acknowledged that it would be best to have a "full and complete record" before an employee is fired, Mr. Hunt denied that Union Pacific had any obligation to call witnesses on behalf of the Complainant, simply stating that it is the investigating officers call to make. (HT, pp. 65–68.) Mr. Lopez testified that if Complainant and his union representative requested witnesses, "it's at their expense," which is also what he told Mr. Verna when he requested witnesses. (HT, p. 332.)

[25] Mr. Tamisiea testified that he saw the letter from Complainant to Mr. Yedlick and Mr. Lopez requesting that eight witnesses and a series of documents be brought into the hearing. (HT, p. 149.) Mr. Yedlick does not recall ever receiving the letter Complainant submitted to Union Pacific requesting witnesses and documents, but would have expected Mr. Cisneros to give it to him. (HT, pp. 105–06.) Mr. Stebens and Mr. Lopez do not recall seeing that letter. (HT, pp. 193; 302.)

Regarding the investigation, Complainant feels that the transcript "speaks for itself" in that he was "denied due process" and there was "nothing in the record to justify terminating [him]." (HT, p. 477.) In Complainant's opinion, Union Pacific did not prove the charges, it did not bring forth witnesses, and the superintendent did not do his job. (HT, p. 477.) On the other hand, Mr. Yedlick testified that he would not have done anything differently with regard to Complainant's investigation and discipline. (HT, p. 122.) However, at his deposition, Mr. Yedlick stated that he "probably would have had a different discussion, definitely." (HT, p. 123.)

Union Pacific's Decision to Terminate Complainant

Following the investigation, Union Pacific decided to exonerate Mr. Foster and terminate Complainant for "failure to comply with his obligation to report a defective locomotive." (JX 7.) A document entitled "Closeout JD Foster Investigation" contains Mr. Carpio's recommendation that the charge against Conductor Foster be dismissed. (JX 34, p. 1.) Union Pacific explained the decision by stating that Mr. Carpio believed Mr. Foster relied on Rule 1.40 and "felt he did his part on reporting an engine defect." (JX 34, p. 1.) Another document with the same title contains Mr. Carpio's recommendation that the charges of Rule 1.2.5 and 1.6 be sustained against Complainant because "[Complainant's] account of the incident came to light 58 days after the alleged incident places negligence on his part to rectify a defective equipment, that could have possibly injured another employee, is not of the best interest of the company nor it's (sic) employees." (JX 35, p. 1.)

Mr. Hunt testified that he approved Complainant's termination because he believed Complainant was negligent in not notifying management of the locomotive defect sooner. (HT, pp. 70, 82, 85.) Mr. Hunt repeatedly stressed that in his mind, this was a safety issue. (HT, pp. 86–87.) Though Mr. Yedlick testified at the hearing that Complainant's injury report did not affect his decision to terminate him, at his deposition, he testified that while the injury report was not the driving factor, it was a factor he considered. (HT, pp. 96–97.) In his own words, Mr. Yedlick stated that he made the decision to terminate Complainant because he "failed to report, in a prompt manner, a locomotive defect." (HT, p. 125.) He also echoed Mr. Hunt's safety concerns. (HT, pp. 125–26.)

Mr. Hunt later testified that he made the decision to charge Mr. Harvey with a terminable offense and approved the firing without ever having read the investigation transcript. (HT, p. 42.) At the time he decided to charge and eventually terminate Complainant, Mr. Hunt was also unaware of Mr. Foster's testimony that Complainant slipped and fell but did not believe he was injured, filled out a bad order tag and tagged the locomotive, and entered something on the tie-up sheet. (HT, p. 42.) When asked whether he should have known these facts before making the decisions to charge and fire Complainant, Mr. Hunt responded, "That is Mr. Yedlick's job." (HT, p. 43.) Mr. Hunt stated that he based his decision on "the recommendation from the superintendent [Mr. Yedlick]." (HT, p. 45.) However, Mr. Hunt does not have any e-mails, notes, or other documents from Mr. Yedlick to indicate whether the charges were warranted. (HT, p. 48.) Mr. Hunt also never read Complainant's account of why he was turning in a late report before deciding to assess discipline, and he does not believe that it would have been important for him to do so. (HT, pp. 55–56.)

Mr. Yedlick issued the termination letter on August 14, 2009, which detailed that Complainant was terminated, in part, because of his failure "to report a locomotive defect." (HT, p. 95; JX 8.) Mr. Yedlick cannot recall any other person he has ever terminated for this reason. (HT, p. 95.) Mr. Yedlick also sent the letter to Mr. Foster informing him that the charges against him were not sustained. (JX 9.) Complainant received his termination letter at the post office and felt "totally angry." (HT, p. 479.) After he was terminated, Complainant experienced some temporary problems getting medical coverage through his insurance, which he believes occurred because Union Pacific informed the insurance company that he was no longer an employee. (HT, pp. 501–03.) Complainant did not miss a mortgage or car payment following his termination from Union Pacific. (HT, pp. 504–05.)

There is evidence that Union Pacific managers and employees did not want Complainant to continue working at Union Pacific for reasons unrelated to the incident in this case. After Complainant was terminated, on October 6, 2009, Mr. Reilly sent an e-mail to Mr. Tamisiea stating, among other things, that Complainant had "led a charmed life" because he had "been fired many times in the past and gets back to work." (JX 10, p. 1; JX 11, p. 2.) Mr. Reilly also wrote that the other members of Complainant's unit "don't want him working on their SRU," and that Complainant had "filed at least a few EEO suits against [Union Pacific]." (JX 10, p. 1.) Mr. Reilly also wrote in this e-mail that he believed Complainant currently had another lawsuit against Union Pacific in progress. (JX 10, p. 1.) Mr. Reilly later testified that this meant that the managers did not want Complainant to continue working there, and in this case, like in some other termination cases, managers have said to Mr. Reilly that they want him to do his best to ensure that a charged employee does not return to work. (HT, p. 181.) Mr. Lopez also admitted that he did not want to work with Complainant on his service unit, stating that he "was just hard to get along with. He wasn't cordial enough. He just seemed to want to just be himself or left by himself. Didn't seem to want to be a team player." (HT, pp. 316–17.) Though Mr. Stebens testified at the hearing that he did not want Complainant fired, he stated at his deposition that he considered Complainant to be "a detriment to Union Pacific Railroad." (HT, p. 196.)

Complainant's Appeal of Union Pacific's Decision

On October 13, 2009, the BLET appealed Complainant's termination on his behalf. (JX 36.) The BLET asserted that "the Carrier failed to provide Claimant a full, fair, and impartial investigation, and there is clear evidence of prejudgment." (JX 36, p. 3.) The BLET identified several issues as the basis for the appeal, including problems with Union Pacific's recording device, Union Pacific's refusal to allow Mr. Verna to record the investigation hearing, the exclusion of Complainant's letter requesting witnesses and documents, and Union Pacific's refusal to call any of Complainant's witnesses. (JX 36, pp. 3–4.)

On November 2, 2009, Complainant's case was reviewed and discussed at a quarterly conference with all of the general chairmen for Union Pacific. (HT, p. 154–55; JX 10, p. 3.) In preparation for this meeting, Mr. Reilly did a "cursory review" of the investigation transcript and prepared a summary of Complainant's case. (HT, pp. 179–80.) After this meeting, Mr. Tamisiea reviewed Complainant's discipline file and ultimately concluded that Union Pacific had not proven that Complainant was negligent. (HT, p. 140.) Mr. Tamisiea based this conclusion on the credibility of Complainant's and Mr. Foster's assertions that they told the relieving crew about the leaky ice box, and the lack of evidence indicating that the ice box had needed to be repaired.

(HT, pp. 146–48.) In an e-mail to Mr. Yedlick, Mr. Reilly, Mr. Hunt, Gayla Barlow, and other Union Pacific employees, Mr. Tamisiea wrote, "While [Complainant] is guilty of the late reporting, a review of the transcript is weak on the merits. Even though the report was 58 days after the alleged incident we did not provide any evidence or testimony from the mechanical Department (sic) or locomotive history report. We did not call the relieving crew or other crews who may have operated the locomotive. The transcript consisted more of on going (sic) and repeated objections." (JX 12, p. 1.)

Mr. Reilly later reviewed Complainant's investigation transcript and the exhibits in greater depth, and also concluded that the railroad failed to prove the charges against Complainant enough to survive review by the Public Law Board. (HT, pp. 169, 180.) On November 27, 2009, Mr. Reilly sent an e-mail to Mr. Yedlick stating,

> I believe we must immediately reinstate [Complainant] and pay him for time lost. The reason I believe we must do this is because we did not prove [Complainant] failed to report the defect as required by the rules. Further, even if he failed to report it to the dispatcher and failed to report it on his tie up, we did not prove there was willful neglect in his alleged failure to do so. If we do not put him back to work now, we'll have to put him back to work later and owe him more money than we do now.

(JX 16.) Mr. Reilly determined that there was clear testimony that Mr. Foster saw Complainant tag the locomotive and fill out the proper form, and the record indicated that Complainant notified the relieving crew of the defect. (HT, pp. 170–71.) After reaching this determination, Mr. Reilly instructed Mr. Yedlick to overturn the disciplinary action and return Complainant to work immediately. (HT, pp. 174–75.) This was largely because he was "fairly sure" that the case would be overturned by the Public Law Board. (HT, p. 175.) Mr. Reilly did, however, believe that Complainant was guilty of filing a late report, regardless of whether Complainant knew he was injured immediately after the incident. (HT, pp. 176–77.)

On November 27, 2009, the same day he told Mr. Yedlick to reinstate Complainant, Mr. Reilly responded to the BLET's appeal with a letter stating, "The instant claim is denied in its entirety." (JX 14, p. 2.) Later that day, Mr. Reilly issued another letter, intended to serve as an amendment to his earlier response to the appeal, stating, "After further review of the record, the Carrier has determined it cannot sustain a dismissal charge against [Complainant]." (JX 15.) Mr. Reilly also wrote that Complainant would be returned to service at a discipline Level 3 and compensated for time lost in excess of the five-day suspension required for a Level 3 offense. (JX 15.) On December 3, 2009, Mr. Reilly wrote to Mr. Yedlick and others that Complainant needed to be reinstated immediately because Union Pacific had not proven the negligence charge. (JX 40.) Mr. Reilly did believe, however, that Union Pacific had proven the late reporting charge, and this would serve as the basis for Level 3 discipline and a violation of Rule 1.2.5. (JX 40.)

Union Pacific's Offer of Leniency

Following Union Pacific's review of Complainant's termination, Union Pacific decided to offer him reinstatement on a leniency basis because of his length of service, among other

things. (HT, p. 36; JX 12, p. 1; JX 13.) This decision was made after Mr. Hunt spoke with the general chairman, who felt that the Complainant's "point of appeal would be very strong." (HT, p. 84.) Multiple managers collaborated to make this decision. (HT, p. 155.) When asked why he did not consider Complainant's length of service before making the decision to charge him, but later considered it relevant to the decision to reinstate him, Mr. Hunt replied, "When a superintendent has a situation that he believes he has a possible rules violation, and something that is very serious [in] that we might have a safety issue that we've not addressed, the first thing I do is, I try to understand the seriousness of the incident or the potential seriousness of the incident. That's my first decision, that I try to make." (HT, p. 37.) Mr. Hunt admitted that between the time he made the determination to charge Complainant and the time that he decided to offer Complainant reinstatement, he did not learn anything new that he could not have learned initially. (HT, p. 37.)

Mr. Tamisiea wrote a letter to the general chairman of the BLET, dated November 4, 2009, offering Complainant reinstatement, with the following conditions attached: (1) Complainant would return to service on a "leniency basis" with no pay for lost time; (2) Complainant's return to service would be subject to the usual rules, physical examination requirements, and FRA license certification requirements; (3) Complainant would be required to take five days or classroom/simulator training and safety instruction without pay; and (4) Complainant would be on probation at Level 2 as of August 14, 2009, the date of the initial notice of discipline. (JX 13.)

There is no evidence that Complainant ever directly responded to Union Pacific's offer of leniency.[26] In fact, a series of e-mails demonstrates that Union Pacific managers never received any communication from Complainant and wanted to initiate further charges against Complainant for his lack of responsiveness. On December 30, 2009, Mr. Stebens wrote to Mr. Reilly, Mr. Yedlick, Mary Gulley, and Gayla Barlow asking whether anyone had heard from Complainant regarding his acceptance or rejection of Union Pacific's offer of reinstatement. (JX 18, p. 2.) Mr. Stebens inquired as to whether it had been over 30 days, stating, "If so he's AWOL and we will charge him as such." (JX 18, p. 2.) Mr. Reilly replied that after Union Pacific sent a third notice and waited the appropriate period of time, they could issue an AWOL notice. (JX 18, p. 3.) Ms. Barlow wrote back, "We (sic) give an additional 14 days to provide the documentation. If he still doesn't comply you can proceed with discipline." (JX 18, p. 2.) In February 2010, Ms. Gulley replied, "I have note (sic) received anything either. But AWOL comes to mind if he has not responded to three requests!" (JX 18, p. 5.) Similarly, on February 18, 2010, Mr. Reilly wrote:

> If no one has received any medical documentation from [Complainant], especially the Medical Department, we should then notice [Complainant] to report for an AWOL investigation. We present our evidence that we reinstated him and sent him three separate letters requesting he provide documentation of his medical condition and he has failed to respond. Unless he can demonstrate mitigating circumstances that warrant his failure to properly protect his employment, we dismiss him for AWOL.

[26] Mr. Tamisiea testified that while he does not have any record of Complainant formally rejecting the offer of leniency, Complainant did not sign the offer by the deadline Union Pacific gave him. (HT, p. 155.)

(JX 18, p. 8.)

On March 23, 2010, Complainant wrote to Union Pacific that he would not submit any medical documentation until his employee status was restored in the Union Pacific system. (JX 41.) At the time, Complainant was concerned that his Employee Work History Detail page still showed his status as Level 5 discipline. (JX 41.)

Complainant's Emotional Distress

Complainant states that as a result of his termination from Union Pacific, he has suffered and continues to suffer severe emotional distress. (JX 22, p. 1.) He claims that at the time of his termination, he was "extremely distraught" because he knew he had done nothing to warrant termination and that he was being singled out and retaliated against for reporting an injury. (JX 22, p. 1.) He further states, "I was extremely fearful that the company would do everything it could to ruin me and my family. I wanted to seek psychological help as a result of my termination, but I was very fearful of doing so because I felt that [Union Pacific] would use this fact against me if I was ever to get back to work as an engineer – they would use the treatment to say I was crazy and incompetent to operate a locomotive." (JX 22, pp. 1–2.) Complainant describes how he felt hopeless, shocked, scared, hurt, and offended as a result of his investigation and termination. (JX 22, p. 2.) These emotions were magnified as a result of news reports indicating a poor job market with "[h]igh unemployment rates for individuals over 50 years old," "thousands of people … losing their jobs daily," major national corporations facing bankruptcy and closing facilities, and high rates of foreclosure and homelessness. (JX 22, p. 2.) Complainant was concerned that if he was terminated, he would be unable to find another job due to his age, the economic climate, and his injury. (JX 22, p. 2.)

In addition to Complainant's concerns about the economic climate, his wife's ailing health contributed to the stress and anxiety he experienced. (JX 22, p. 3.) Complainant feared that he would lose his family's health insurance and his wife would no longer receive the treatment and care that she required. (JX 22, p. 3.) Complainant's wife requires an MRI every three months that costs $2,393.83, monthly medications totaling $1,448.18, and monthly injections that cost $30. (JX 22, p. 4.) Complainant was also worried that he would no longer be able to pay for the medications required by his stepdaughter. (JX 22, p. 4.) Complainant's stepdaughter requires medications totaling approximately $778.66 per month. (JX 22, p. 4.)

Complainant also experienced "frustration" and "anguish" as a result of the disciplinary hearing and investigation process. (JX 22, p. 5.) He believed that the process itself was "unjust" and "set up to terminate [him]." (JX 22, p. 5.) The Complainant felt "The investigation hearing amounted to a kangaroo court and was set up to get [him] fired." (JX 22, p. 5.) Complainant's termination on August 14, 2009, caused him to feel "exceedingly overwhelmed, helpless, hopeless, angry, frustrated, disheartened, and anxious." (JX 22, p. 5.) The Complainant felt that his worst fears had been realized, and he continued to worry that he would not be able to find another job or support his family. (JX 22, p. 5.) Complainant also felt "betrayed" that Union Pacific "threw out [his] 32 years of loyal service without any remorse," which he found to be "tremendously dehumanizing and devastating." (JX 22, p. 5.) Because Complainant had previously taken so much pride in his work, his termination from Union Pacific "suddenly and

improperly took all that from [him] thereby depriving [him] of such life joy" and causing him "significant sadness, emotional pain, and grief." (JX 22, p. 6.)

ANALYSIS AND FINDINGS

Credibility Determinations

The ARB has stated its preference that ALJs "delineate the specific credibility determinations for each witness," though it is not required. *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-008 (ARB July 2, 2009). In weighing the testimony of witnesses, the ALJ as fact finder may consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *Gary v. Chautauqua Airlines,* ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006).

The Complainant's Credibility

I find that the Complainant was forthright and honest throughout the hearing and will give his testimony substantial weight. His testimony was usually corroborated by other evidence, and I find his explanations reasonable. For example, Complainant's testimony that Mr. Nevil "went ballistic" when Complainant submitted his injury report, though disputed by Mr. Nevil, is corroborated by Mr. Tovar's testimony that the conversation was "heated." In addition, his testimony regarding placing the bad order tag on the locomotive was corroborated by Mr. Foster. I also find his description of the stress and anxiety he felt following his termination from Union Pacific to be realistic and believable. Though at times it was clearly difficult for him to discuss his wife's health condition, I believe he was honest, forthright, and sincere in his testimony. Respondent has not disputed Complainant's credibility or given me any reason to disbelieve Complainant's testimony. Therefore, I find Complainant to be a credible witness and will give his testimony more weight in instances where there are conflicts.

Credibility of Union Pacific's Managers

I find that, as a whole, Union Pacific's managers were not credible witnesses. Their testimony was riddled with contradictions and self-serving statements that I believe were meant to minimize Union Pacific's liability rather than assist in developing a full factual record. For example, I found Mr. Hunt's explanation of the reason for considering Complainant's length of service in the leniency determination but not the initial charge, investigation, or termination to be illogical and incredible. It simply does not make sense that an employee's 35 years of service would be relevant to whether the employee is reinstated following termination, but not relevant to the initial decision to investigate and terminate that employee. Mr. Hunt nonetheless offered an explanation for this. Mr. Hunt's testimony is full of similar examples of his attempts to minimize Union Pacific's culpability rather than answer the question honestly. Mr. Hunt testified that he does not "consider it a problem" that employees are afraid to turn in accident reports,[27]

[27] HT, p. 53.

that he did not believe Union Pacific's investigation was hasty,[28] and that he did not believe it would be important to hear an employee's explanation for a late report before deciding to assess discipline.[29] Finally, I find Mr. Hunt's denial that he "rubber-stamped" the investigation to be false and defensive. He testified that he never read the investigation transcript or gathered any information before approving Complainant's investigation, termination, and reinstatement, and that he did not believe it was necessary for him to do so. [30] To me, that is rubber-stamping. For these reasons, I find that Mr. Hunt was not a credible witness.

I also find that Mr. Yedlick is not a credible witness. Initially, there were multiple contradictions between his deposition testimony and hearing testimony. At the hearing, Mr. Yedlick testified that Complainant's injury report did not affect the decision to terminate him, but at his deposition, he testified that though it was not "the driving factor," it was "a factor."[31] Mr. Yedlick also contradicted himself on the issue of whether the number of reported injuries could affect a manager's bonus. At the hearing, he said that it would not, but at his deposition he testified that it would.[32] Finally, at the hearing, Mr. Yedlick testified that he would not have done anything differently, despite his deposition testimony that he "definitely" would have had "a different discussion."[33] These are just a few examples of the inconsistencies in Mr. Yedlick's statements, and the fact that these inconsistencies developed on such key issues in the case is suspicious. Accordingly, I find that Mr. Yedlick is also not a credible witness.

Similarly, Mr. Reilly is not a credible witness. His explanation of Union Pacific's requirement that all injuries be immediately reported did not make sense and he refused to acknowledge that if someone does not know he is injured, he cannot make a report.[34] I am also unpersuaded by his testimony regarding why Complainant was charged with a violation of Rule 1.6 for not reporting the locomotive defect to management. Mr. Reilly claimed the Complainant was terminated for negligence in reporting a locomotive defect, despite the fact that he reported a defect in compliance with Rule 1.40. In my view, Mr. Reilly is trying to craft a new standard for discipline that simply does not exist, likely to justify the actions that were taken against Complainant.[35] Finally, I find that there is substantial evidence of Mr. Reilly's bias towards Complainant. The e-mails Mr. Reilly sent to other managers about how Complainant "led a charmed life," was "fired many times in the past and gets back to work, had "filed at least a few EEO suits" against Union Pacific, and had another lawsuit currently in progress[36] demonstrate that Mr. Reilly, at the very least, did not want Complainant to continue working for Union Pacific. All of this weighs against Mr. Reilly's credibility.

[28] HT, p. 47.
[29] HT, pp. 55–56.
[30] HT, pp. 42–48.
[31] HT, pp. 96–97.
[32] HT, pp. 117–18.
[33] HT, pp. 122–23.
[34] HT, pp. 176–77.
[35] HT, p. 184. "My understanding was that Mr. Harvey was terminated for negligence in failing to report the locomotive defect properly."
[36] JX 10, p. 1, JX 11, p. 2.

Mr. Stebens was also not a credible witness. Initially, Mr. Stebens repeatedly answered "I don't recall" when asked about the events of this case.[37] Like the other Union Pacific managers, there were several contradictions between his deposition testimony and hearing testimony, including regarding the issue of whether he wanted the Complainant fired.[38] I also find that Mr. Stebens repeatedly gave strained interpretations of Union Pacific policies in order to justify the discipline assessed against Complainant. For example, Mr. Stebens either did not know whether filling out a bad order tag qualified as a proper way to report a locomotive defect or refused to admit that Complainant had properly reported the locomotive defect.[39] Mr. Stebens also repeated Mr. Reilly's absurd belief that the requirements for reporting locomotive defects go above and beyond the parameters of Rule 1.40, which I do not find reasonable.[40] Finally, regarding Mr. Verna's letter to Union Pacific that reiterated Complainant's request for witnesses and documents, Mr. Stebens stated, "He's not asking those documents to be produced. What he was doing is failing his duty to be the author of the letter that describes the request for witnesses and documents." (HT, p. 229.) At this point, I stopped this line of questioning at the hearing because it was already abundantly clear to me that Mr. Stebens was using every possible strained interpretation of the rules to justify Union Pacific's behavior. As such, I find that Mr. Stebens is not a credible witness and I will not give his testimony any weight.

In addition, Mr. Nevil was not a credible witness. As previously described, I find that his testimony regarding the discussion when Complainant reported his injury to be unreliable. Mr. Nevil testified that the conversation did not get heated when the Complainant reported his injury and he did not get upset. This contradicts Complainant's testimony that Mr. Nevil "went ballistic" and Mr. Tovar's testimony that the conversation was "heated." (HT, pp. 236–37.) Based on Complainant's and Mr. Tovar's testimony, I believe that Mr. Nevil did get upset and he is only denying it now in an attempt to save face and minimize Respondent's liability. This weighs against his credibility. There were also contradictions between Mr. Nevil's deposition testimony and hearing testimony. For example, at his deposition he testified that when Complainant reported his injury, he immediately believed Complainant was guilty of violating safety rules, but at the hearing he denied this. (HT, p. 233.) In addition, Mr. Nevil, like the other Union Pacific managers, also attempted to stretch or fabricate Union Pacific rules. When asked whether there was a rule requiring an employee to verbally describe an incident when reporting an injury, Mr. Nevil replied, "There's a policy of addressing immediate concerns or immediate concerns that somebody else may get injured." (HT, pp. 235–36.) When pressed to identify a specific rule that applied, he conceded, "I couldn't tell you" and later said, "It is not in GCOR." (HT, p. 236.) Overall, these issues demonstrate to me that Mr. Nevil is not a credible witness.

[37] HT, pp. 191 ("I don't recall" having a discussion about charging Complainant); 193 ("I don't recall ever seeing" Complainant's request for witnesses); 200 ("Don't recall" what I was doing in California, "I don't know" how long I was there); 207 ("I don't recall" communicating with anyone about Complainant); 211 ("I don't recall" telling Mr. Reilly that I didn't want Complainant on the SRU).

[38] HT, pp. 196. At the hearing, Mr. Stebens testified that he did not want Complainant fired, but at his deposition, when asked if he would prefer if Complainant was not on his service unit, he testified that he believed Complainant "was a detriment to Union Pacific Railroad."

[39] Mr. Stebens was repeatedly asked wither filling out a bad order tag was a proper way to report a locomotive defect, and his answers were that he "disagreed" with Mr. Reilly and Mr. Tamisiea about whether it was; "In this case it wasn't done"; and "The proper form was not filled out." HT, pp. 214–15.

[40] HT, pp. 223–24.

Mr. Lopez's testimony was also not credible as I found him to be disingenuous and defensive. For example, when asked about Complainant's request for witnesses and exhibits at the investigation hearing, Mr. Lopez was evasive and refused to acknowledge that the letter was sent to him, despite seeing his name on the top of the paper.[41] I also believe that Mr. Lopez was exaggerating the potential hazard on the train as a result of management not being directly notified of the defective ice box. He repeatedly made statements designed to play up the notion that Complainant had allowed a potentially unsafe condition to persist, when in actuality, he acknowledged that nothing was ever found to be wrong with the locomotive.[42] For example, Mr. Lopez testified that a defective refrigerator could possibly take an entire train out of service, something that I find personally unlikely. (HT, pp. 320–321.) Finally, the fact that Mr. Lopez often did not remember the details of the investigation leads me to find that he is not a credible witness. Numerous times, Mr. Lopez stated that he did not recall the details of his involvement in Complainant's investigation and termination, especially with regard to the major issues in this case.[43] For these reasons, I find that Mr. Lopez was not a credible witness.

I also found Mr. Carpio to be evasive and incredible. There were many instances of Mr. Carpio not recalling the details of this investigation, despite the fact that he had only conducted approximately 12 hearings. (HT, p. 361.) For example, Mr. Carpio testified that he does not remember refusing to admit Complainant's letter at the investigation, which I find very difficult to believe in light of his limited experience with investigative hearings. (HT, pp. 355–56.) He also did not remember that Mr. Lopez refused to bring in the witnesses and documents requested by Complainant, which I find similarly unbelievable. (HT, p. 355.) Mr. Carpio's testimony regarding Union Pacific's obligation to bring in witnesses was also riddled with inconsistencies and technicalities. Mr. Carpio acknowledged that investigations should be conducted in a fair and impartial manner, with both sides given an opportunity to present all evidence, and that it is specifically the carrier's responsibility to present all the relevant facts, whether or not they favor or are adverse to Complainant. (HT, p. 351.) However, Mr. Carpio refused to acknowledge that the carrier, and not the union, has the ability to call witnesses out of work, and also said, "As a

[41] This exchange occurred as follows:
Mr. Otis: "Now isn't it true that Mr. Harvey and Mr. Harvey's union representative, Mr. Verna, requested documents and witnesses to be present at the investigation hearing, true?"
Mr. Lopez: "There (sic) may have, I don't remember."
Mr. Otis: "Okay. I'd like to direct your attention to what's called Claimant's Exhibit 1. … Do you see that letter there?"
Mr. Lopez: "Yes, sir, I do."
Mr. Otis: "Are you addressed on this letter?"
Mr. Lopez: "I see where it's from Mr. Harvey going to Union Pacific Railroad Superintendent Office."
Mr. Otis: "Is this your name on the letter?"
Mr. Lopez: "That's my name, but I don't know if it's addressed to me, is what I'm saying." (HT, p. 301.)

[42] Mr. Lopez stated, "[W]hat he explained to me was that there was something wrong with the refrigerator door. So, now we had a locomotive out there, for almost two months, and I looked into it and nothing had been reported bad order." (HT, p. 319.) He also said, "And I had asked him, if you find something, please, let me know, and as soon as possible, so that we can get this unit set out or taken out of service, so nobody will get hurt on it." (HT, p. 320.)

[43] Mr. Lopez did not remember what evidence he introduced in Complainant's investigation, which witnesses were called to the investigation, whether he ever reviewed or received a locomotive defect history, whether Complainant requested witnesses and documents at his investigation hearing, whether he received the letter requesting witnesses from Complainant, whether he provided Mr. Verna with any documents, whether he talked to the relieving crew, whether he spoke to Complainant before issuing the charge letter. (HT, pp. 293, 295, 297, 301, 302, 304, 306, 313.) These are just a few examples of his limited memory.

charging officer, it's not my responsibility to bring in [the complainant's] witnesses. It's my responsibility to bring in my witnesses." (HT, pp. 352–53.) For several minutes, Mr. Carpio went back and forth regarding Union Pacific's responsibility to call witnesses, and I believe he was not being completely forthright but instead wanted to justify his and Respondent's conduct in this matter. Finally, I also find it both strange and telling that Mr. Carpio shredded his notes following the investigation. When asked why he did this, he responded, "I don't need them." (HT, p. 364.) I believe that Mr. Carpio's testimony at the hearing demonstrates exactly why he does need his investigative notes and also why he is not a credible witness.

Mr. Thurman's testimony was likewise motivated more by an attempt to defend Union Pacific rather than give truthful information. For example, when asked whether he believed Complainant should have had all applicable rules spelled out in his charge letter, Mr. Thurman replied, "I can't answer yes or no." (HT, p. 380.) When further pressed, Mr. Thurman said, "The agreement does not require that." (HT, p. 380.) I believe Mr. Thurman answered this way in order to justify Union Pacific's conduct. The question was about Mr. Thurman's opinion on this issue, and instead, he defensively gave his interpretation of the provisions of the agreement between Union Pacific and the BLET. I also found Mr. Thurman's testimony to be evasive regarding the issue of whether repairs had been done on the defective locomotive. During the hearing, I asked him if it was possible that the fact that no repairs needed to be done at the time Complainant reported his injury could mean that the repairs had already been done. He did not want to acknowledge this possibility. (HT, pp. 394–96.) Mr. Thurman stated there could not have been any repairs made because there were no defects reported, and he cited federal law regarding documentation for repairs. (HT, pp. 394–95.) I also asked him whether this could mean that there was never actually a defect in the first place, and he ultimately conceded that that was possible. (HT, pp. 395–96.) Ultimately, I believe that Mr. Thurman was just sticking to the company line that Complainant should have reported the locomotive defect to management, and he was reluctant to waver from that assertion. Therefore, I find that Mr. Thurman was not a credible witness.

With regard to Mr. Tovar, there were numerous inconsistencies between his prior statements and his hearing testimony, and he also tried to minimize Union Pacific's culpability through evasive answers. For example, when asked whether the initial conversation between Mr. Nevil and Complainant was "heated," he responded, "I believe Mr. Nevil just wanted to know what the circumstances were." (HT, p. 436.) When pressed, Mr. Tovar responded, "Define 'heated' for me." Finally, when presented with his deposition testimony that the conversation was, in fact, "heated," Mr. Tovar finally acknowledged that it was. (HT, pp. 436–37.) This exchange makes clear that Mr. Tovar was reluctant to answer truthfully because he wanted to defend Mr. Nevil and minimize the fact that Mr. Nevil reacted angrily to Complainant's injury report. Mr. Tovar's testimony was also inconsistent regarding whether Complainant finished filling out his injury report before Mr. Tovar took him to the hospital. (HT, pp. 439–441.) Overall, Mr. Tovar's memory was not great – he often paused before giving answers, and acknowledged that his memory was limited because the events of this case "happened some time ago." (HT, p. 435.)

I also find that Mr. Tamisiea's testimony was evasive and biased toward justifying Union Pacific's actions. When asked whether Union Pacific's investigation was deficient and whether the managers rushed to judgment, Mr. Tamisiea replied, "I can't answer that." (HT, p. 152.)

When further asked about his opinion of the investigation, he replied, "We just didn't prove our case on the transcript of investigation." (HT, p. 152.) Mr. Tamisiea's testimony regarding when an injury report is warranted was also confusing and inconsistent. He acknowledged that some employees may not realize they are injured right away, and that if the employee does not believe he is injured, he should not submit a report. (HT, pp. 156–57.) However, he also stated "if there's an incident, that may cause it, then yes, he should turn it in." (HT, p. 159.) Despite multiple pages of testimony about this issue, I never got a clear understanding of when Mr. Tamisiea believes an employee should turn in an injury report. I believe he was evasive and dodging these questions in order to justify Union Pacific's actions.

The only Union Pacific witness I found to be credible was Mr. Orosco, who testified about Union Pacific's UPGRADE policy and how discipline is assessed. There were no inconsistencies in Mr. Orosco's testimony, and he seemed well-versed in the subject matter he was discussing. Unfortunately, Mr. Orosco was not involved in Complainant's investigation or termination; perhaps if he was, things would have gone differently.

Legal Analysis

Applicable Law: Elements and Burdens in a FRSA Claim

The FRSA states that railroad carriers "may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part" to any protected activities. 49 U.S.C. § 20109(a). Actions brought under the FRSA are governed by the burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"). *See* 49 U.S.C. § 20109(d)(2)(A)(i). In order to prevail, a complainant must demonstrate that: (1) he engaged in protected activity; (2) the employer knew that he engaged in protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action. *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013). The employee bears the initial burden, and must show "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). The burden then shifts to the employer, who must demonstrate "by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected behavior." *Id.* § 1982.109(b).

In this case, Complainant and Respondent have stipulated that Union Pacific is a covered employer and Complainant is a covered employee under the FRSA. Therefore the remaining issues are whether Complainant engaged in protected activity, whether Respondent knew of this protected activity, whether Complainant suffered an unfavorable personnel action, and whether the protected activity was a contributing factor in the unfavorable personnel action. Each of these issues is examined in detail below.

1. Complainant Engaged in Protected Activity

Section 20109(a) of the FRSA identifies several protected activities, including providing information or assisting in an investigation regarding potential violations of law, refusing to violate the law, filing a complaint applicable to railroad safety or security, notifying the railroad

carrier of an injury, cooperating with a federal safety or security investigation, furnishing information to a governing body, or accurately reporting hours. 49 U.S.C. §§ 20109(a)(1)–(7). In addition, Section 20109(b) lays out more protected activities, including reporting a hazardous safety condition, refusing to work under hazardous conditions, or refusing to authorize the use of hazardous or unsafe equipment. 49 U.S.C. §§ 20109(b)(1)–(3). Protected activities related to seeking medical care are laid out in Section 20109(c).

Complainant contends that he engaged in two protected activities: (1) filing an injury report, and (2) reporting a locomotive defect. (Complainant's Closing Brief, p. 3.) Respondent does not deny that Complainant engaged in two protected activities, and in fact admits that Complainant reported an injury on June 17, 2009. (Respondent's Closing Brief, pp. 5–6.)

I find that the record demonstrates that Complainant engaged in two protected activities. The FRSA lists the submission of an injury report and the report of a defective condition as protected activities. 49 U.S.C. §§ 20109(a)(4); 20109(b)(1)(A). It is undisputed that on June 17, 2009, Complainant submitted an injury report and a written narrative of the incident. (JX 1; JX 2.) Messrs. Hunt, Yedlick, Thurman, and Nevil all testified that Complainant reported both an injury and a locomotive defect on June 17, 2009. (HT, pp. 33, 94, 231, 238–39, 373–74.) I also find that Complainant reported a locomotive defect on April 19, 2009, by filling out a bad order tag, which is established by his testimony and corroborated by Mr. Foster's deposition testimony. (HT, pp. 266–67; JX 47, pp. 26–27.) Several Union Pacific managers testified that this is a proper means of reporting a locomotive defect. (HT, pp. 91, 146.) Accordingly, I find that Complainant has engaged in two protected activities – reporting an injury on June 17, 2009, and reporting a locomotive defect on June 17, 2009, and April 19, 2009.

2. Respondent Knew of Complainant's Protected Activities

Generally, it is not enough for a complainant to show that his employer, as an entity, was aware of his protected activity. Rather, the complainant must establish that the decision makers who subjected him to the alleged adverse actions were aware of his protected activity. *See Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-38 (ARB Jan 31, 2006); *Peck v. Safe Air Int'l, Inc*., ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004).

Here, there can be no legitimate dispute over whether the decision makers at Union Pacific knew of Complainant's protected activity. In its closing brief, Respondent does not deny that Union Pacific's managers were aware of Complainant's reporting of an injury and locomotive defect. Complainant reported his injury directly to Mr. Nevil and Mr. Tovar, and during that conversation, he also informed them of the locomotive defect. In addition, Messrs. Hunt, Yedlick, Thurman, and Nevil all testified that on June 17, 2009, they were aware that Complainant reported both an injury and a locomotive defect. (HT, pp. 33, 94, 231, 238–39, 373–74.) Mr. Yedlick and Mr. Hunt were the managers who decided to investigate and charge Complainant. Even if a legitimate argument could be made that Union Pacific managers were unaware of Complainant's initial report on the bad order tag, they eventually became aware of it when he told them about the incident and described taking this action during the investigation hearing. The main issue that was discussed during Union Pacific's investigation hearing was whether Complainant had properly reported his injury and the locomotive defect. (JX 6.) Accordingly, I find that Union Pacific was aware of Complainant's protected activity.

3. Complainant Suffered Two Unfavorable Personnel Actions

The FRSA specifies that a railroad carrier may not "discharge, demote, suspend, reprimand, or in any other way discriminate against an employee" on the basis of protected activity. 49 U.S.C. § 20109(a). The regulations further state that employers "may not discharge, demote, suspend, reprimand, or in any other way discriminate against, including but not limited to intimidating, threatening, restraining, coercing, blacklisting, or disciplining an employee" for engaging in protected activity. 49 C.F.R. § 1982.102(b)(1). The ARB has held that "unfavorable personnel actions" include reprimands, written warnings, and counseling sessions where (a) it is considered discipline by policy or practice, (b) it is routinely used as the first step in a progressive discipline policy, or (c) it implicitly or expressly references potential discipline. *Williams v. American Airlines*, ARB No. 09-018, ALJ No. 2007-AIR-00004 (ARB Dec. 29, 2010); *Vernace v. PATH*, OALJ No. 2010-FRS-00018 (OALJ Sept. 23, 2011), *aff'd, Vernace v. PATH*, ARB No. 12-003, ALJ No. 2010-FRS-018 (ARB Dec. 21, 2012).

The ARB has made clear that whistleblower standards are meant to be interpreted expansively, as they have "consistently been recognized as remedial statutes warranting broad interpretation and application." *Menendez v. Halliburton*, ARB Nos. 09-002 and 09-003, ALJ No. 2007-SOX-2005, at 15 (ARB Sept. 13, 2011). Cautioning against applying the more stringent standards found in Title VII cases, the ARB noted the safety issues present in "hazard-laden, regulated industries" and the "FRSA's extensive legislative history citing the rampant practices of abuse and intimidation inflicted on railroad workers who reported or even attempted to report work injuries." *Williams*, ARB No. 09-018 at 12; *Vernace*, ARB No. 12-003 at 3. It is thus clear that "a broad range of actions may qualify as unfavorable personnel actions under whistleblower statutes such as the FRSA, where they may not qualify in Title VII claims." *Vernace*, OALJ No. 2010-FRS-00018 at 25, *aff'd. Vernace*, ARB No. 12-003. The ARB has since reiterated that in whistleblower claims, an adverse action is any action that "would dissuade a reasonable employee from engaging in protected activity." *Menendez*, ARB Nos. 09-002 and 09-003 at 20.

Complainant contends that Respondent took two adverse actions against him: (1) sending Complainant a notice of investigation, and (2) terminating Complainant's employment. (Complainant's Closing Brief, p. 4.) Respondent disputes whether the investigation itself qualifies as an adverse action under the FRSA, arguing that not every investigation and discipline after a report of personal injury or defect constitutes adverse personnel action under the FRSA. (Respondent's Closing Brief, p. 3.) I will examine each action in turn.

A. Complainant's Termination was an Adverse 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. Ellerth*, 524 U.S. 742, 761 (1998); *Crady v. Liberty Nat. Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir. 1993). It is undisputed that Complainant was terminated from his position with Union Pacific on August 14, 2009. (Respondent's Closing Brief, p. 6; Complainant's Closing Brief, p. 4; JX 8.) Therefore I find that Complainant suffered an adverse personnel action when his employment with Union Pacific was terminated.

B. Union Pacific's Notice of Investigation was an Adverse Action

The parties disagree over whether Union Pacific sending Complainant a notice of investigation qualifies as an adverse action. (Complainant's Closing Brief, p. 4; Respondent's Closing Brief, p. 3.) Complainant relies on *Vernace*'s holding that the filing of disciplinary charges against the complainant was an unfavorable personnel action. (Complainant's Closing Brief, p. 4.) Respondent attempts to distinguish *DeFrancesco v. Union Railroad Company* from the facts of this case, but does not fully flush out its argument. Respondent's closing brief states, in relevant part,

> *DeFrancesco* does not stand for the proposition that any investigation and discipline after a report of personal injury or defect constitutes adverse personnel action under the FRSA. Indeed, *DeFrancesco*, (sic) involved an investigation and discipline following an **immediate** report of injury. … Under the facts of *DeFrancesco*, the complainant was disciplined for carelessness after reporting an injury. … As such, in *DeFrancesco*, it appears obvious the report of injury in question gave rise to the investigation and discipline. In the present case, however, Complainant was disciplined not for simply reporting an injury and a defect but for his delay.

(Respondent's Closing Brief, p. 3, emphasis in original.) Though Respondent's argument begins as an argument that the investigation was not an adverse personnel action, its conclusion appears to be more directed towards whether Complainant's protected activity was a contributing factor to the adverse action, and indeed, *DeFrancesco* deals more with whether the complainant's protected activity contributed to the adverse action. *DeFrancesco v. Union Railroad Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009 (ARB Feb. 29, 2012).

I find that Union Pacific's notice of investigation was an adverse action. As Complainant points out, the *Vernace* court dealt with a nearly identical issue and found that a charging letter qualified as adverse action under the FRSA. *Vernace v. PATH*, OALJ No. 2010-FRS-00018 (OALJ Sept. 23, 2011), *aff'd, Vernace v. PATH*, ARB No. 12-003, ALJ No. 2010-FRS-018 (ARB Dec. 21, 2012). The ARB has also held that a written warning is presumptively adverse, not only when it is considered discipline in and of itself, but also where it is routinely used as the first step in a progressive discipline policy or implicitly or expressly references potential discipline. *Williams v. American Airlines*, ARB No. 09-018, ALJ No. 2007-AIR-00004, slip op. at 15 (ARB Dec. 29, 2010). On June 24, 2009, Union Pacific sent a letter to Complainant entitled "Notice of Investigation" and informing him that he was being charged with a Level 5 infraction that may result in his dismissal. (JX 5.) This clearly references potential discipline and is used as the first step in Union Pacific's disciplinary process. (*See* HT, pp. 166–67 (Mr. Reilly's testimony that the labor agreement between Union Pacific and the unions requires a notice of investigation to be sent prior to an investigation).) Accordingly, I find that Complainant suffered two adverse personnel actions: (1) Union Pacific's notice of investigation, and (2) Complainant's termination from employment.

4. Complainant's Protected Activity was a Contributing Factor to Union Pacific's Adverse Actions

A "contributing factor" includes "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011). The contributing factor element of a complaint may be established by direct evidence or indirectly by circumstantial evidence. *See, e.g., Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, at 13 & n.69 (ARB Sept. 30, 2011), citing *Sylvester v. Paraxel Int'l, LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042, slip op. at 27 (ARB May 25, 2011). Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation of the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity. *See, e.g., Id.; Bobreski v. J. Givoo Consultants, Inc,* ARB No. 09-057, ALJ No. 2008-ERA-003, slip op at 13 (ARB June 24, 2011).

Complainant makes several arguments that Union Pacific's adverse actions against him resulted from his protected activity. Complainant asserts that his protected activity was a contributing factor to Union Pacific's adverse actions because: his protected activity triggered the disciplinary process; his protected activity is "inextricably intertwined with and affected" Union Pacific's adverse actions; Union Pacific "openly admits" that his protected activities affected its decision to investigate and terminate him; the timing of the decision to investigate and terminate Complainant creates presumptive causation; and circumstantial evidence demonstrates that Complainant's protected activities were contributing factors to the adverse actions. (Complainant's Closing Brief, pp. 5–32.) On the other hand, Respondent argues that Union Pacific's investigation and subsequent decision to terminate Complainant were based on safety concerns due to Complainant's late submission of an incident report rather than Complainant's protected activity. (Respondent's Closing Brief, pp. 2–4.)

After reviewing all of the evidence, I am convinced that Complainant's protected activity was a contributing factor in Union Pacific's decision to investigate and terminate him. Initially, I agree with Complainant that his submission of an injury report triggered the disciplinary process. Had Complainant not filed his injury report, Union Pacific would never have initiated the investigation that ultimately resulted in Complainant's dismissal. Complainant correctly cites the "but for" causation standard laid out in *DeFrancesco.* In that case, like this one, the complainant's report of his injury triggered the manager's review of his personnel records, which ultimately led to his suspension. *DeFrancesco v. Union Railroad Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009 (ARB Feb. 29, 2012). This was the basis for the ARB's finding in *DeFrancesco* that the complainant's protected activity served as the basis for the railroad's adverse action, and this is the basis for my finding that Complainant's protected activity was the reason for Union Pacific's adverse action.

Respondent attempts to distinguish *DeFrancesco* because *DeFrancesco* involved the timely filing of an injury report while this case involves the untimely filing of an injury report. (Respondent's Closing Brief, p. 3.) I do not find this argument credible for a variety of reasons. Initially, Complainant correctly relies on the ARB's analysis in *Henderson v. Wheeling & Lake*

Erie Railway. ARB No. 11-013, ALJ No. 2010-FRS-012 (ARB Oct. 26, 2012). In that case, like this one, the complainant was investigated for filing a late report of injury. *Id*. The ARB relied on *DeFrancesco* and held that in cases where a complainant is investigated for submitting a late injury report, if the injury report triggers an investigation, there is a presumptive inference of causation. *Id*. at 13. The ARB further stated, "Effective enforcement of the Act requires presumptive causation under circumstances such as Henderson's, where viewing the 'untimely filing of medical injury' as an 'independent' ground for termination could easily be used as a pretext for eviscerating protection for injured employees." *Id*. at 13. In this case, it is clear that Complainant's injury report triggered the investigation. Mr. Hunt testified that Union Pacific automatically investigates any late report and that any employee who submits a late report should be the subject of an investigation. (HT, pp. 54–55; 81.) The fact that any late injury report will automatically trigger an investigation, and the fact that Complainant was specifically charged with filing a late injury report lead me to find that Complainant's protected activity was a contributing factor to the adverse action.

Furthermore, perhaps Respondent's argument would gain some traction if Complainant had known of his injury long before he submitted the injury report, but Complainant credibly testified that he did not believe he was injured until shortly before he submitted the report. (HT, pp. 447–48.) By way of example, if Complainant had very obviously injured himself when he slipped on the stairs, perhaps by breaking a limb or requiring stitches, yet waited 60 days to file the injury report, then Union Pacific would likely be entitled to investigate the late report. However, in this case, Complainant initially believed he was not seriously injured and that the soreness in his back would die down with rest and home care. (HT, pp. 447–48.) When he later realized that he had actually injured himself more seriously, he filed the injury report shortly thereafter. (HT, pp. 448; 452.) Despite Complainant's logical explanation that he reported the injury as soon as he realized he was injured, Union Pacific immediately chose to investigate and subsequently terminate him, which defeats Respondent's argument that *DeFrancesco* can be distinguished from the present case.

The disparate treatment between Complainant and Mr. Foster further illustrates that Complainant's protected activity was the basis for Respondent's decision to terminate Complainant. Both Complainant and Mr. Foster knew of the defective ice box, but Mr. Foster never reported an injury or a locomotive defect. (HT, pp. 265–66; JX 47, pp. 27–28.) Mr. Foster was investigated for a potential violation of Rule 1.6, but ultimately exonerated. (JX 7; JX 34, p. 1.) Complainant was the only one who engaged in protected activity, and he was the only one who was terminated. To me, this demonstrates that Complainant's protected activity was a contributing factor to Respondent's decision to terminate him.

In addition, Complainant's protected activity of reporting an injury and a locomotive defect is inextricably intertwined with Union Pacific's adverse actions. The *Henderson* court noted that where the content of a report or disclosure (the filing of which constitutes the protected activity) gives an employer the reasons for personnel action against a complainant, the protected activity is inextricably intertwined with the adverse action. *Henderson*, ARB No. 11-013, ALJ No. 2010-FRS-012 at 12 n. 49, citing *Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007 (ARB June 20, 2012). Here, Complainant's report of his injury and the locomotive defect caused Union Pacific to investigate the Complainant for negligence, and Union Pacific used the information contained in that report as the basis for the investigation

and subsequent termination. Complainant's June 17, 2009, injury report contained information about the ice box being defective. (JX 1, p. 2.) The information that Complainant gave to Union Pacific about the defective locomotive in his June 17, 2009, injury report caused Union Pacific to investigate and ultimately terminate Complainant. This suggests that the report of the injury and locomotive defect report was inextricably intertwined with the adverse action, creating a presumption of causation and ultimately demonstrating that Complainant's protected activity was a contributing factor to Union Pacific's adverse actions.

Mr. Yedlick also directly admitted that Complainant's protected activities affected Union Pacific's decision to investigate and terminate him. During the hearing, Mr. Yedlick was asked if Complainant's injury report affected his decision to terminate him, to which he responded, "No, sir." (HT, p. 96.) Complainant's attorney then proceeded to impeach Mr. Yedlick with prior deposition testimony wherein Mr. Yedlick admitted that while Complainant's injury "was not the driving factor," it was "a factor" in the decision. (HT, p. 97.) During the hearing, Complainant's counsel followed up by asking whether Complainant's locomotive defect report also formed the basis for the decision to terminate him, to which Mr. Yedlick replied, "Yes, sir." (HT, p. 97.) I believe that (1) the discrepancies between Mr. Yedlick's testimony at his deposition and at the hearing, and (2) Mr. Yedlick's ultimate admission that Complainant's locomotive defect report affected the decision to terminate him indicate that Complainant's protected activity did in fact affect Union Pacific's decision to investigate and terminate him.

Further, I find that the timing of Union Pacific's adverse actions also creates a presumption of causation between Complainant's protected activities and Union Pacific's adverse actions. The *DeFrancesco* court makes clear that the "contributing factor" element of a complainant's prima facie case may be established through circumstantial evidence, including temporal proximity. *DeFrancesco*, ARB No. 10-114, ALJ No. 2009-FRS-009, at 6–7. "While not always dispositive, the closer the temporal proximity, the greater the causal connection there is to the alleged retaliation; this indirect or circumstantial evidence can establish causation in a whistleblower retaliation case." *Smith*, ARB No. 11-003, ALJ No. 2009-ERA-007 at 7. Here, Union Pacific's immediate decision to investigate Complainant following his submission of an injury report demonstrates that Complainant's protected activity was a contributing factor. Respondent admitted via interrogatory that Mr. Lopez made the decision to charge Complainant with violating GCOR rules on the very same day that Complainant filed his report. (JX 24, p. 2.) Further, multiple Union Pacific managers presumed Complainant's guilt as soon as they learned of his protected activities but before reviewing any of the evidence.[44] The letter informing Complainant that he was being investigated was sent to him on June 24, 2009, just one week after he filed his injury report. (JX 5.) The close temporal proximity between Complainant's protected activities and when Union Pacific's managers decided to investigate him and decided that he was guilty of rules violations indicates that Complainant's protected activity was a contributing factor to Union Pacific's adverse actions.

[44] Mr. Lopez testified that he believed Complainant was guilty of a rule violation on the very same day that Complainant submitted his injury report. (HT, pp. 309–10.) Mr. Nevil testified that on the day Complainant reported his injury, Mr. Nevil believed he was negligent. (HT, pp. 233–34.) Mr. Thurman testified that on the day Complainant reported his injury and the locomotive defect, he believed that Complainant "had violated rules" and "was guilty of late reporting an injury." (HT, p. 374.)

Additionally, I find that there is evidence of animus from Union Pacific's managers toward Complainant. Mr. Tovar testified that when Complainant initially reported his injury, the conversation was "heated," and Complainant stated that Mr. Nevil was "shouting" and "pretty much went ballistic." (HT, pp. 436–37; 452–53.) Complainant also testified that as soon as he reported the injury and locomotive defect, Mr. Thurman told him, "We're going to have an investigation and we're going to fire somebody." (HT, p. 460.) E-mails between Union Pacific managers further demonstrate the animus Union Pacific managers felt toward Complainant. Mr. Reilly was responsible for reviewing Complainant's case following the investigation when Complainant had filed an appeal. After the hearing, on October 6, 2009, Mr. Reilly e-mailed Mr. Tamisiea saying that Complainant had "led a charmed life" because he had "been fired many times in the past and gets back to work." (JX 10, p. 1; JX 11, p. 2.) Mr. Reilly also wrote that the other members of Complainant's unit "don't want him working on their SRU." *Id.* Incredibly, Mr. Reilly also wrote in the e-mail that Complainant had "filed at least a few EEO suits against [Union Pacific] and that he believed Complainant currently had another lawsuit against Union Pacific in progress. *Id.* Though these e-mails were not sent until after Complainant had already been investigated and terminated, they indicate the general sense of hostility and animus towards Complainant. Mr. Reilly also testified that Union Pacific's managers wanted him to do the best he could to ensure that Complainant did not return to work.[45] (HT, pp. 181–82.)

Further, there is evidence that Mr. Stebens and Mr. Lopez disliked Complainant and did not want him working for Respondent anymore. Though at the hearing Mr. Stebens testified that he did not want Complainant to be fired, at his deposition he admitted that he believed the Complainant was a "detriment" to Union Pacific. (HT, p. 196.). Mr. Lopez also admitted that he did not want to work with Complainant on his service unit, and he felt Complainant "was just hard to get along with. He wasn't cordial enough. He just seemed to want to just be himself or left by himself. Didn't seem to want to be a team player." (HT, pp. 316–17.) To me, this animus further demonstrates that Complainant's protected activity was a contributing factor to Union Pacific's adverse actions.

I also find that Union Pacific's stated reasons for terminating Complainant were false and pretextual. Throughout the hearing, Union Pacific's managers repeatedly stated that they made the decision to investigate and terminate Complainant because they were concerned about safety and the fact that a potentially defective locomotive was traversing the country and creating a hazard for Union Pacific employees.[46] However, Complainant was never charged with violating the Union Pacific rule that deals with late reporting of locomotive defects, which is Rule 1.40. Mr. Tamisiea even admitted that if Union Pacific was so concerned with Complainant's late reporting of a locomotive defect, they should have charged him under Rule 1.40 rather than 1.6 and 1.2.5. (HT, pp. 141–42.) Instead, Union Pacific chose to charge Complainant with late reporting of an injury and a catch-all rule prohibiting negligence and carelessness. Further,

[45] Though Mr. Reilly was not involved in the initial decisions to investigate and terminate Complainant, I believe that his e-mails are indicative of the general feeling among managers toward Complainant.

[46] Mr. Lopez testified, "Safety is our number one priority." (HT, pp. 330–31.) He also described his concern that a potentially defective train had been traveling around for two months with the potential to injure someone. (HT, p. 319.) Mr. Hunt testified that he approved the investigation because of the "potential risk" to everyone who had handled the locomotive in the time between Complainant's incident and when he reported his injury. (HT, p. 32.) He further testified that Complainant was terminated because he "was negligent in not notifying management that we had a safety issue at a locomotive." (HT, p. 70.)

despite their assertions that they were truly concerned with the condition of this train and the safety of their employees, several Union Pacific managers testified that they took very minimal steps to locate the train and determine if it was defective.[47] This indicates to me that Union Pacific was not, in fact, concerned with the safety hazards associated with a defective locomotive, but instead used that reason as pretext to cover up the real reasons they chose to investigate and terminate Complainant.

To the contrary, most Union Pacific managers actually concede that Complainant reported the locomotive defect in a manner that is consistent with written Union Pacific rules and procedures. Complainant testified that following his fall on the ice and spilled water, he filled out a bad order tag and put it on the isolation switch in the locomotive, then later told the outbound crew about the defective ice box. (HT, pp. 266–67; 268.) This account is corroborated by Mr. Foster, who saw Complainant fill out a bad order tag. (JX 47, p. 26.) In addition, Mr. Hunt and Mr. Tamisiea testified that they believe that Complainant filled out and placed the bad order tag on the locomotive, and no one disputes that this occurred. (HT, pp. 60; 145–46.) Multiple managers also testified that filling out a bad order tag is a proper way to report a defective locomotive.[48] This further undermines Union Pacific's stated reasons for investigating and terminating Complainant and demonstrates that Respondent's proffered reason for Complainant's investigation and termination was pretext.

Finally, I am most convinced that Respondent's stated reasons for terminating Complainant are pretextual because Respondent stretches its own rules to illogical interpretations in order to justify Complainant's investigation and termination. Ultimately, Complainant was terminated due to a violation of Rule 1.6 ("negligence") because Respondent said Complainant should have done more to report the defective ice box on the locomotive. However, most managers agreed that Complainant complied with the locomotive defect reporting requirements as stated in Rule 1.40. Incredibly, several of Respondent's managers justify Complainant's termination by saying that the locomotive defect requirements actually go above and beyond the requirements of Rule 1.40 and require the employee to report the defect directly to a manager.[49] While some of the managers conceded that Union Pacific's written rule on locomotive defect reporting does not require the employee to make a report to a manager,[50] they still persisted in this strained interpretation of the rules in an attempt to justify Complainant's investigation and termination. It simply defies logic that Union Pacific would have a stated rule on locomotive defect reporting, and that fully complying with that rule could still subject an employee to

[47] Mr. Hunt testified that after Complainant reported his injury, he asked Mr. Yedlick where the locomotive was and Mr. Yedlick did not know. (HT, p. 32.) Mr. Yedlick testified that he never learned where the potentially defective locomotive went following Complainant's injury or how many crews encountered it. (HT, p. 132.) Mr. Lopez testified that he did not bring any locomotive defect records to Complainant's hearing. (HT, pp. 299–301.)

[48] Mr. Tamisiea testified that a bad order tag is a proper way to report a defective locomotive under Rule 1.40. (HT, p. 146.) Mr. Hunt conceded that there is no rule requiring a locomotive defect be reported to a manager. (HT, p. 71.)

[49] Mr. Hunt claimed the Complainant "was negligent in not notifying management that we had a safety issue at a locomotive." (HT, p. 70.) Mr. Yedlick testified that reporting locomotive defects "goes beyond GCOR 1.40." (HT, p. 100.) Mr. Reilly stated that it was his understanding that Complainant was fired due to his "failure to properly report" a locomotive defect. (HT, p. 180.) Mr. Stebens also testified that Rule 1.40 is not the only rule that applies to locomotive defect reporting, and that Rule 1.6 also applies. (HT, pp. 212–15.)

[50] Mr. Yedlick conceded that there is no written rule that adds to the requirements stated in Rule 1.40. (HT, p. 100.) Mr. Hunt testified that he believes Rule 1.6 requires an engineer to report locomotive defects to a manager, but agreed that there is no written rule requiring it. (HT, p. 71.)

discipline for not going above and beyond what is explicitly required. To me, the only explanation for this unreasonable application of the rules is that it is actually pretext for the true reason Complainant was disciplined, which was his protected activity.

In conclusion, all of the foregoing reasons lead me to believe that Complainant's protected activity was a contributing factor to Union Pacific's adverse actions against him. Complainant has shown by a preponderance of the evidence that: (1) his protected activity triggered the investigative process; (2) Complainant's protected activity is inextricably intertwined with Union Pacific's adverse actions; (3) Union Pacific managers admit that Complainant's protected activity affected their decision to investigate and terminate Complainant; (4) the timing of Union Pacific's adverse actions creates a presumption of causation; (5) Union Pacific's managers harbored animus toward Complainant; and (6) Union Pacific's proffered reasons for disciplining Complainant were pretextual. Accordingly, Complainant has established a prima facie case that Respondent has violated the whistleblower protection provisions of the FRSA, and the burden now shifts to Respondent to show by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected behavior. *See* 29 C.F.R. § 1982.109(b).

Respondent Has Not Demonstrated that it Would Have Taken the Same Adverse Action in the Absence of Any Protected Behavior

Respondent does not offer any defense to Complainant's prima facie case, instead focusing its efforts on arguing that Complainant's protected activity was not a contributing factor to Respondent's adverse actions. (Respondent's Closing Brief; Respondent's Reply to Complainant's Closing Brief.) Respondent asserts, "Stated simply, the facts of this case do not warrant application of the FRSA. These events demonstrate a carrier taking necessary action to investigate an employee's irregularity in late reporting an injury caused by defective equipment." (Respondent's Closing Brief, pp. 3–4.) Respondent further elaborates: "Respondent was well within its authority to investigate the circumstances surrounding a late report of injury from an alleged defect. Indeed, failing to investigate would likely constitute a lack of diligence on Respondent's part, especially in light of Respondent's duty to report on-duty injuries to the Federal Railroad Administration." (Respondent's Reply to Complainant's Closing Brief, p. 2.) However, I do not find this argument convincing because Complainant credibly testified that he did not believe he was injured until shortly before he filed the injury report.

Complainant argues in his closing brief that Union Pacific "cannot offer any legitimate defense" because Union Pacific automatically investigated immediately following Complainant's protected activity. (Complainant's Closing Brief, p. 32.) I am inclined to agree. Ultimately, it is Respondent's obligation to establish a defense by clear and convincing evidence, and because Respondent has not offered any arguments or evidence to demonstrate that it would have taken the same adverse action even in the absence of Complainant's protected activity, I find that Respondent has violated the whistleblower protection provisions of the FRSA.

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." 49 U.S.C. § 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).[51] Compensatory damages are designed to compensate whistleblowers not only for direct pecuniary loss, but also for such harms as loss of reputation, personal humiliation, mental anguish, and emotional distress. *Simon v. Sancken Trucking Co.*, ARB No. 06-039, ALJ No. 2005-STA-040 (ARB Nov. 30, 2007), citing *Hobby v. Ga. Power Co.*, ARB Nos. 98-166, -169, ALJ No. 1990-ERA-030, at 33 (ARB Feb. 9, 2001). Punitive damages up to $250,000 are also authorized. 49 U.S.C. § 20109(e)(3).

The parties agree that Complainant is medically disqualified from returning to his position with Union Pacific and is not seeking reinstatement or lost wages as part of the claim in this case. (*See* HT, p. 496; RX 1.)[52] Complainant seeks compensatory damages resulting from emotional distress, and punitive damages against Union Pacific. (Complainant's Closing Brief, pp. 33–40; Complainant's Reply Brief, pp. 6–7.)

1. Respondent's Argument Regarding Election of Remedies Has Already Been Rejected

Citing 49 U.S.C. § 20109(f), Respondent argues that Complainant's claim should be dismissed because he has already "elected to pursue relief under the [Railway Labor Act]." (Respondent's Closing Brief, pp. 4–5.) Respondent made this argument in its motion for summary decision, dated August 13, 2012, and I rejected the argument in my Order Denying Respondent's Motion for Summary Decision dated August 29, 2012. Accordingly, I will not consider this argument now.

2. Complainant is Entitled to Damages for Emotional Distress

Complainant argues that he is entitled to damages for emotional distress because his investigation and termination from Union Pacific "put a lead weight on his already heavy plate." (Complainant's Closing Brief, p. 33; Complainant's Reply Brief, p. 6.) Specifically, Complainant contends that he is entitled to damages for emotional distress due to the anxiety he faced regarding the potential loss of income and health insurance coverage when Complainant is responsible for supporting his wife and step-daughter, both of whom have significant medical needs. (Complainant's Closing Brief, p. 33.) Respondent never addresses this argument in either of its briefs.

Compensatory damages include damages for emotional distress. In order to recover, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused mental suffering or emotional anguish. *Testa v. Consol. Edison Co., Inc.*, ARB No.

[51] *See Vernace v. PATH*, ALJ No. 2010-FRS-018 (OALJ Sept. 23, 2011), *aff'd., Vernace v. PATH*, ARB No. 12-003, ALJ No. 2010-FRS-018 (ARB Dec. 21, 2012); *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-00047 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-003, -004 at 8 (ARB Sept. 29, 2011) (noting complainant may seek damages for mental hardship under the Act).

[52] Though the parties did not agree to a formal stipulation on this issue, both parties do agree that Complainant is not seeking reinstatement or back pay, and neither party argues for this type of relief in their closing briefs. In addition, the FELA settlement agreement reached between Complainant and Respondent provides that Complainant has waived all claims for back pay or reinstatement arising out of the incident in this case. (RX 1, pp. 1–2.)

08-029, ALJ No. 2007-STA-027 at 11 (ARB Mar. 19, 2010). 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). A complainant's credible testimony alone is sufficient to establish emotional distress. *Hobson v. Combined Transport Inc.*, ARB Nos. 06-016, -053, ALJ No. 2005-STA-035 at 8 (ARB Jan. 31, 2008).[53]

I find that Complainant is entitled to compensatory damages for emotional distress. Complainant repeatedly described the fear, anxiety, and distress he experienced as a result of his investigation and termination from Union Pacific. (HT, pp. 476; JX 22.) As a result of his termination, Complainant was constantly worried that he would lose his income and his health insurance, especially because of the severe health problems his wife and stepdaughter who depend on him were facing. Respondent's actions directly caused Complainant a great deal of stress because he was concerned he would not be able to support himself or his family, and was worried that he would be unable to find alternate employment in the bleak job market our country was facing at the time. Though there are no medical or psychological records corroborating this testimony, Complainant credibly explained that he was afraid to seek professional help because he believed Union Pacific would be able to access those records and later use them as a basis upon which to deny him employment opportunities or job duties. (JX 22, pp. 1–2.) Further, a complainant is not required to provide medical documentation of emotional distress in order to recover compensatory damages. A complainant's credible testimony alone is sufficient to establish emotional distress.[54] Therefore, I find that Complainant has shown by a preponderance of the evidence that Union Pacific's adverse actions caused his mental suffering and emotional anguish and that he is entitled to compensatory damages for emotional distress.

"[A] key step in determining the amount of compensatory damages is a comparison with awards made in similar cases." *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, 169, ALJ No. 1990-ERA-030, slip op. at 32 (ARB Feb. 9, 2001). Here, Complainant requests compensatory damages of $500,000, an amount that is not supported by case law and I believe to be unreasonable. (Complainant's Closing Brief, p. 41.) In similar cases, compensatory damages have ranged from $4,000 to $250,000.[55] Based on those cases and the evidence provided by

[53] *See also Jones v. EG&G Defense Materials, Inc.*, ARB No. 97-129, ALJ No. 1995-CAA-003, slip op. at 22 (ARB Sept. 29, 1998) ("Although the testimony of health professionals may strengthen the case for entitlement to compensatory damages, it is not required. … All that is required is that the complainant show that he experienced mental and emotional distress and that the wrongful discharge caused the mental and emotional distress." (internal citations omitted)).

[54] *Hobson*, ARB Nos. 06-016, -053, slip op. at 8; *Jones*, ARB No. 97-129, slip op. at 22.

[55] *See Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047 (ARB Aug. 31, 2011) (awarding $50,000 in compensatory damages for emotional distress); *Smith v. Lake City Enterprises, Inc.*, ARB Nos. 09-033, 08-091, ALJ No. 2006-STA-032 (ARB Sept. 28, 2010) ($20,000 in compensatory damages for emotional distress); *Carter v. Marten Transport, Ltd.*, ARB Nos. 06-101, -159, ALJ No. 2005-STA-063 (ARB June 30, 2008) ($10,000); *Hobson v. Combined Transport, Inc.*, ARB Nos. 06-016, -053, ALJ No. 2005-STA-035 (ARB Jan. 31, 2008) ($5,000); *Waechter v. J.W. Roach & Sons Logging & Hauling*, ARB No. 04-183, ALJ No. 04-STA-43 (ARB Dec. 29, 2005) ($20,000); *Jackson v. Butler & Co.*, ARB Nos. 03-116, 144, ALJ No. 2003-STA-026 (ARB Aug. 31, 2004) ($4,000); *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071, 095, ALJ No. 02-STA-035 (ARB Aug. 6, 2004) ($10,000); *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, -169, ALJ No. 90-ERA-030 (ARB Feb. 9, 2001) ($250,000); *Jones v. EG&G Defense Materials*, ARB No. 97-129, ALJ No. 95-CAA-003 (ARB Sept. 29, 1998) ($50,000); *Van Der Meer v. Western Kentucky Univ.*, ARB No. 97-078, ALJ No. 95-ERA-038 (ARB Apr. 20, 1998) ($40,000); *Michaud v. BSP Transport, Inc.*, ARB No. 97-113, ALJ No. 95-STA-029 (ARB Oct. 9, 1997) ($75,000);

Complainant, I find that an award of $25,000 is appropriate. This case is akin to *Smith v. Lake City Enterprises, Inc.*, in which the ARB affirmed an award of $20,000 in compensatory damages for emotional distress based solely on the complainant's testimony and that of his wife. ARB Nos. 09-033, 08-091, slip op. at 11. In that case, the award was based on "testimonial evidence of objective manifestations of [the complainant's] emotional distress, including irregular sleeping and eating patterns, anxiety, and marital stress." *Id*. Similarly, in this case, Complainant submitted a declaration stating that he was "extremely afraid, distraught, anxious, and distressed" as a result of Union Pacific's actions and that when he was notified of Union Pacific's investigation, his "horror, anxiety, stress, and fear reached untold levels." (JX 22, pp. 2–3.) Complainant also states that he frequently lost sleep and had nightmares that his medical insurance would be cut off and his wife and step-daughter would be refused medical treatment as a result. (JX 22, p. 6.) I find that this case is similar to *Smith* and therefore a comparable award of compensatory damages is appropriate.[56] I am awarding $25,000 rather than $20,000 because of the added anxiety of supporting a wife and stepdaughter with serious medical needs.

I find that this case is also distinguishable from cases in which significantly lower awards were made. Cases with awards of $10,000 or less typically involved some mental anguish and distress, but in my view, the complainants in those cases did not describe emotional distress quite as severe as Complainant's experience in this case.[57] In addition, the complainants' experiences in cases with awards of $10,000 or less were not compounded by the type of extraordinary pressure Complainant experienced in this case to ensure that life-sustaining medical care would continue to be provided for his wife and stepdaughter. Though the complainants in other cases with lower awards testified that they experienced some of the same feelings as Complainant in this case, Complainant had the added concern that his family may lose health care and insurance benefits during a time when his wife required brain surgery and extensive medical care, and his stepdaughter continued to need expensive medication every month due to a lifelong disability. Finally, those cases, many of which were decided in the early 2000s, did not have the added element of the economic downturn and the fear that alternate work would not be available. In my view, these factors warrant a higher award for emotional distress.

This case can also be distinguished from those in which significantly higher awards of compensatory damages were made for emotional distress. In cases with awards of $50,000 or

---

Bigham v. Guaranteed Overnight Delivery, ARB No. 96-108, ALJ No. 95-STA-037 (ARB Sept. 5, 1996) ($20,000); *Creekmore v. ABB Power Systems Energy Services, Inc.*, ALJ No. 93-ERA-024 (Dep. Sec. Dec. and Rem. Ord. Feb. 14, 1996) ($40,000).

[56] This case is also similar to *Bigham v. Guaranteed Overnight Delivery*, wherein an employee was awarded $20,000 for "emotional distress and mental anguish" caused by wrongful termination. ARB No. 97-113, ALJ No. 95-STA-037 (ARB Sept. 5, 1996).

[57] *See, e.g., Hobson v. Combined Transport, Inc.*, ALJ No. 2005-STA-035 at 12 (ALJ Nov. 10, 2005) (complainant awarded $5,000 for "increased anxiety and stress" with "only one reference during his testimony to the anxiety and stress that resulted from the Respondent's actions"), *aff'd. Hobson v. Combined Transport, Inc.*, ARB Nos. 06-016, 053, ALJ No. 2005-STA-035 (ARB Jan. 31, 2008); *Jackson v. Butler & Co.*, ALJ No. 2003-STA-026 at 10 (ALJ June 25, 2003) (complainant awarded $4,000 based on feeling "moody, depressed, and short tempered with a low self-esteem and sense of embarrassment"), *aff'd. Jackson v. Butler & Co.*, ARB Nos. 03-116, -144, ALJ No. 2003-STA-026 (ARB Aug. 31, 2004); *Roberts v. Marshall Durbin Co.*, ALJ No. 2002-STA-035, slip op. at 41–42 (ALJ Mar. 6, 2003) (awarding $10,000 in compensatory damages due to emotional distress, marital strain, and complainant's inability to continue providing the same level of financial security for his wife), *aff'd. Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071, -095 (ARB Aug. 6, 2004).

more, the complainants typically suffered adverse effects above and beyond stress and anxiety, such as losing a home through foreclosure,[58] losing savings and the ability to obtain credit,[59] going from financial stability to requiring public assistance,[60] having neighbors and customers witness the repossession of the complainant's automobiles,[61] actually losing medical coverage,[62] losing the ability to financially support two stepdaughters who were attending college,[63] and having to repeatedly ask family and friends for money.[64] Though Complainant credibly testified that he was afraid that several of these outcomes may occur, none of them ever did.[65] (HT, pp. 501–05.) This is not to say that Complainant's concerns were invalid or that he did not experience serious distress. There is, however, a difference between fearing the loss of medical coverage and actually losing medical coverage, and accordingly, I find that $25,000 is an adequate sum to compensate Complainant for the fear, stress, and anxiety he experienced due to Union Pacific's adverse actions.

Finally, I will point out that OSHA awarded damages of $75,000 for pain and suffering in this case, significantly higher than the $25,000 I am awarding here. (ALJX 2.) OSHA, however, did not explain its justification for this award. This is a *de novo* review, and based on my understanding of the law as applied to the facts of this case, I believe that $25,000 is appropriate.

3. Complainant is Entitled to Punitive Damages

The FRSA authorizes punitive damages "in an amount not to exceed $250,000." 49 U.S.C. § 20109(e)(3). Punitive damages are to punish unlawful conduct and 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 Industries, Inc. v. Leatherman Tool Group, Inc.*, 523 U.S. 424, 434–35 (2001). In whistleblower cases, punitive damages are appropriate to punish wanton or reckless conduct and to deter such conduct in the future. *Johnson v. Old Dominion Security*, ALJ Nos. 86-CAA-003, 004, 005 (Sec'y May 29, 1991). The ARB 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 v. New Prime Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047 at 5 (ARB Aug. 31, 2011).

---

[58] *Ferguson v. New Prime, Inc.*, ALJ No. 2009-STA-047, slip op. at 12 (ALJ Mar. 15, 2010), *aff'd*. *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047 (ARB Aug. 31, 2011); *Michaud v. BSP Transport, Inc.*, ARB No. 97-113, ALJ No. 95-STA-029, slip op. at 9 (ARB Oct. 9, 1997).

[59] *Michaud*, ARB No. 97-113 at 9.; *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, -169, ALJ No. 90-ERA-030 at 32 (ARB Feb. 9, 2001); *Jones v. EG&G Defense Materials*, ARB No. 97-129, ALJ No. 95-CAA-003 (ARB Sept. 29, 1998).

[60] *Ferguson*, ALJ No. 2009-STA-047 at 12; *Michaud*, ARB No. 97-113, slip op. at 9.

[61] *Jones*, ARB No. 97-129, slip op. at 23.

[62] *Id.*; *Ferguson*, ALJ No. 2009-STA-047, slip op. at 12.

[63] *Id.*

[64] *Hobby*, ARB Nos. 98-166, -169 at 32.

[65] Complainant did experience a one-week lapse in medical insurance coverage, but the issue was subsequently corrected. (JX 22, pp. 5–6.) There was also a point where Complainant's wife's and stepdaughter's prescription benefits were delayed for more than a week, but that issue was corrected as well. (JX 22, p. 6.)

Complainant argues that Respondent should be subject to maximum punitive damages for several reasons: (1) Respondent consciously disregarded Complainant's rights by "harassing, intimidating, and retaliating against him"; (2) Respondent "should be punished for failing to properly train and educate its managers" about whistleblower law; (3) Respondent's actions and policies "frustrate the purpose of the FRSA" by discouraging injury and safety reporting; and (4) Respondent's bonus policy encourages managers to "harass, suppress, and retaliate against" employees who report injuries and safety defects. (Complainant's Closing Brief, pp. 34–40.) Respondent argues that punitive damages are improper because: (1) they are "a harsh remedy, not favored by the law"; (2) punitive damages are not warranted in the absence of compensatory relief; and (3) contrary to Complainant's assertions, Respondent's managers are properly trained regarding whistleblower law. (Respondent's Closing Brief, p. 4; Respondent's Reply to Complainant's Closing Brief, pp. 3–4.)

I find Complainant's arguments for punitive damages compelling. Initially, Respondent's argument that punitive damages are improper in the absence of compensatory relief must fail, because I have already awarded Complainant $25,000 in compensatory damages. In addition, Respondent's behavior indicates a high degree of reprehensibility and culpability. The record demonstrates that Respondent's policies and culture have created an atmosphere of fear and discouragement surrounding the reporting of injuries and locomotive defects, and this atmosphere has resulted in a chilling effect on employees' decisions to engage in protected activity. Complainant credibly testified that he did not want to file an injury report because he was afraid of retaliation from Respondent, and he cited several other examples of times when Union Pacific employees experienced retaliation after reporting an injury.[66] Complainant's account is corroborated by the several Union Pacific managers who testified that they were aware that employees were afraid that reporting an injury would "place a target on their back."[67] This culture of fear surrounding employees' protected activities weighs in favor of assessing punitive damages against Respondent.

Further, Complainant's fears of retaliation were realized when he finally reported his injury. Mr. Nevil and Mr. Tovar, without any basis in Union Pacific rules or the law, initially refused to accept Complainant's written injury report and handwritten statement, demanding that he verbally tell them his version of events. (HT, pp. 235, 454–55.) Complainant described how Mr. Nevil "went ballistic" and began shouting that he would not give Complainant an accident report until Complainant verbally explained what happened, and Mr. Tovar confirmed that this conversation was "heated." (HT, pp. 452–53, 437.) Mr. Tovar then took Complainant to the hospital before he could finish writing his statement, and when Complainant returned from the hospital, Mr. Lopez further interrogated him about the incident and his report. (HT, pp. 437, 466–71.) Around this time, Mr. Thurman also told Complainant, "We're going to fire somebody. We're going to have an investigation and we're going to fire somebody." (HT, p. 460.) Several managers determined that Complainant was guilty of a rules violation within hours of him

[66] I make no findings as to whether or not those rumored incidents actually occurred, but only address them here to demonstrate the fact that Complainant and other Union Pacific employees feared retaliation.

[67] Mr. Hunt testified that he is aware that some employees who report injuries subsequently "have a target on their back," but he does not believe that it is a problem. (HT, pp. 52–53.) Similarly, Mr. Yedlick testified that he is aware that some people feel that the railroad unfairly goes after employees that have been injured, and Mr. Tamisiea stated that he has heard that employees sometimes believe they will be subject to harassment or discipline for reporting injuries. (HT, pp. 115; 159.)

submitting the report. (HT, pp. 233–34, 309–10, 374.) This entire sequence of events demonstrates that Complainant's fears were justified. At every step of the way, Respondent made it difficult for Complainant to report his injury, and when he finally decided to do so, he was met with hostility, interrogation, and threats. This weighs in favor of assessing punitive damages against Respondent.

Another reason for assessing punitive damages is that Respondents' official policies discourage injury reporting. For example, Respondent provides incentives for its managers to reduce the number of injuries reported by the employees they supervise. Almost every one of Respondents' managers testified that his bonus is affected by the number of reported injuries, and their annual performance reviews were also submitted as JX 23. (HT, pp. 57, 117–18, 244, 315.) In other words, a higher number of injuries reported on a manager's watch could lead to a reduction in the manager's bonus. The fact that Respondent's official policy regarding performance evaluations connects the number of reported injuries to the manager's bonus clearly gives the manager an incentive to discourage the reporting of injuries. How Respondent could believe that such a policy would not have this effect is unfathomable. In addition, Mr. Hunt testified that Respondent's policy is to investigate every time a late injury report is submitted. (HT, p. 56.) This is also cause for concern because if employees know they will automatically be investigated, they will be less likely to file an injury report. Mr. Hunt acknowledged the possibility that an employee may not realize he is injured at first, only to later file an injury report when the injury persists. Despite this, he still testified that he believes that all late reports should trigger an investigation. (HT, pp. 52–53.) This type of policy would almost certainly create a chilling effect where employees would be reluctant to report an injury due to fear of an investigation and subsequent termination. I find that this weighs in favor of assessing punitive damages.

In addition, I find that Respondent inadequately trained its managers on how to comply with whistleblower law. Several managers testified that they were unaware of various aspects of their legal obligations. Mr. Hunt, Regional Vice President, testified that at the time Complainant reported his injury and notified his managers of a locomotive defect, he was unaware that these were protected activities. (HT, pp. 50–51.) Mr. Yedlick, the superintendent of the Tucson and El Paso Service Units and the one who decided to initiate the investigation in this case, testified that he had never heard of the phrase "protected activity."[68] (HT, p. 121.) Most astoundingly, Mr. Tamisiea, the Director of Labor Relations since 1994, testified that he was not familiar with any of the history or background as to why the whistleblower law was passed, that he only understands "the basics of it," and that at the time of the hearing in 2012, he had only been trained on whistleblower law within the last year. (HT, pp. 160–62.) There are numerous examples of Respondent's managers not being well-versed in whistleblower law, and I am convinced that Respondent has not adequately trained them regarding their duties and legal obligations. This also weighs in favor of assessing punitive damages against Respondent.

Respondent has a different interpretation of its managers' testimony at the hearing, asserting that "[t]he record clearly demonstrates that employees of Respondent are made aware

[68] There were also multiple inconsistencies between Mr. Yedlick's deposition and hearing testimony regarding his training in whistleblower law; at his deposition, he said that he could not recall being instructed to read a whistleblower fact sheet created by OSHA, but at the hearing, he testified that he believes he was instructed to read the fact sheet. (HT, pp. 120–22.)

of the company's policy of 'zero tolerance' regarding retaliation." (Respondent's Brief in Reply to Complainant's Closing Brief, p. 4.) In light of the evidence I cited in the previous paragraph, I disagree. However, even assuming that Respondent's managers were aware of a "zero tolerance policy" regarding retaliation, I do not believe that these managers fully comprehend what constitutes protected activity or retaliation to begin with, so they would be unable to assess whether their behavior and actions comport with those standards. For example, Mr. Stebens testified that prior to 2010, he had never heard of whistleblower law, and that even though he is now aware of it, "[i]t's not going to change the way [he] do[es] business." (HT, p. 199.) Multiple sources of testimony demonstrate that for the most part, Respondent's means of teaching its managers about their obligations under the law is to disseminate fact sheets and post information on bulletin boards, without providing any substantive or in-depth training.[69] The absence of proper, thorough training makes it nearly impossible for Respondent's managers to comply with the law. Accordingly, I find that punitive damages are appropriate.

I am also disturbed by how quickly Respondent's managers rushed to judgment without any real review of the situation, and how hastily the decisions to investigate and terminate Complainant were made. I find it alarming that Mr. Yedlick issued the charge letter without first gathering any information from Complainant or Mr. Foster, and in fact admitted that he did not want to know much detail prior to doing so. (HT, p. 113.) Then, once the charge had been issued and the investigation was scheduled, Respondent made absolutely no effort to ensure a fair and impartial hearing, despite the fact that the investigation had the potential to result in Complainant's termination. Although several of Respondent's managers testified that Complainant was entitled to a fair investigative hearing where all relevant facts, exhibits, witnesses, and documents were presented, the record reveals that this did not occur.[70] Complainant requested several documents and witnesses be produced at his investigation hearing but Respondent refused to produce them. Although he was the one responsible for proving the charges against Complainant, Mr. Lopez did not call any witnesses other than himself. The investigation transcript makes clear that Respondent had no interest in developing a full and complete factual record, but instead was going through the motions required to terminate Complainant, a decision that had likely already been made.[71]

I also find it problematic that procedural safeguards that were put in place to prevent this sort of thing from happening were either not well understood or were not followed. For example, Mr. Hunt, Regional Vice President, was required to approve Respondent's actions at every step: the charges against Complainant, Complainant's termination, and eventually Complainant's reinstatement all had to be signed by him. (HT, p. 42.) In theory, this should serve as a safeguard to ensure that serious personnel decisions are not made without an adequate factual basis. In practice, however, Mr. Hunt admitted that he approved the decision to terminate Complainant and later to reinstate him without ever reading the investigation transcript. (HT, p. 42.) When

[69] Mr. Nevil testified that other than receiving some papers about Respondent's injury reporting policy, he does not recall receiving any training on whistleblower law. (HT, pp. 245–46.) Both Mr. Thurman and Mr. Tamisiea testified that they have a minimal understanding of the law. (HT, pp. 160; 383.)

[70] Mr. Hunt, Mr. Yedlick, Mr. Stebens, and Mr. Lopez all testified that it is important for Union Pacific to develop all of the relevant facts during an investigation. (HT, pp. 66, 103, 106–07, 192, 292.)

[71] This is demonstrated by numerous pieces of evidence, but especially by the fact that Mr. Lopez, the charging officer, testified that prior to the incident in this case he had supervised Complainant for 6 or 7 years and based on that experience, Mr. Lopez "would have loved to have somebody else on [his] service unit." (HT, p. 316.)

asked if he should have known the relevant facts before approving the investigation, Mr. Hunt simply replied, "That is Mr. Yedlick's job." (HT, p. 43.) The fact of the matter is this safeguard was essentially nullified because Mr. Hunt admits that he "based [his] decision off the recommendation from the superintendent" without reading the transcript or gathering any information. (HT, p. 45.) Essentially, once Mr. Yedlick had decided to investigate and terminate Complainant, Mr. Hunt rubber-stamped that decision with no analysis of his own. This lack of enforcement and compliance with procedural safeguards weighs in favor of assessing punitive damages.

Further demonstrating the inconsistencies in Respondent's investigation process is the fact that Complainant's length of service was considered relevant to the decision to offer Complainant leniency following his termination, but was not considered relevant to the decision to charge and investigate in the first place. Mr. Hunt testified that Respondent values employees with lengthy periods of service, and that Complainant's impressive length of service was a factor in Respondent's decision to offer him leniency. (HT, pp. 88–89.) However, Mr. Hunt also testified that Respondent's length of service was not considered when the investigation was authorized. (HT, p. 84.) This distinction makes no sense. The fact that Complainant's length of service was not considered relevant to the initial decision to investigate, but was subsequently factored into the decision to offer leniency, just demonstrates the misguided approach Respondent took in this situation.

In sum, I find that Respondent's conduct in this case is sufficiently egregious to warrant an award of punitive damages. Respondent, through its policies and its managers' response to injury reports, has cultivated an environment where employees are afraid to engage in protected activity for fear of retaliation. In this particular case, Complainant was harassed and bullied by his managers when he submitted an injury report. In addition, Respondent failed to properly train its managers on their duties under the FRSA, resulting in a team of managers who barely understand the basics of the law. Perhaps as a result of their lack of understanding of the law, as soon as Complainant submitted his injury report and notified the managers of a locomotive defect, Respondent's managers rushed to judgment and decided that they were going to terminate Complainant. The investigation was merely a procedural hurdle along the way that provided no real weighing of the facts and evidence. The safeguard of having Mr. Hunt approve all disciplinary decisions was rendered pointless because he essentially just rubber stamped the decisions that had been made by other managers. All of this compels me to find that Respondent's behavior was sufficiently reprehensible to justify awarding Complainant punitive damages. I make this assessment to punish Respondent for its illegal behavior and also as a deterrent to engaging in this conduct in the future.

Considering the range of punitive damages that may be assessed, I find that punitive damages in the amount of $100,000 are justified. There have been several FRSA whistleblower cases against Union Pacific where punitive damages were assessed, ranging from $1,000 to $100,000.[72] I have also surveyed other FRSA cases where punitive damages have been assessed

[72] *See Griebel v. Union Pacific Railroad Co.*, ALJ No. 2011-FRS-011 (ALJ Jan. 31, 2013) (assessing punitive damages against Union Pacific in the amount of $100,000); *Jackson v. Union Pacific Railroad Co.*, ALJ No. 2012-FRS-017 (ALJ Feb. 15, 2013) (awarding $1,000 in punitive damages); *Petersen v. Union Pacific Railroad Co.*, ALJ No. 2011-FRS-017 (ALJ Aug. 7, 2013) (awarding $100,000 in punitive damages); *Smith v. Union Pacific Railroad Co.*, ALJ No. 2012-FRS-039 (ALJ Apr. 22, 2013) (assessing $25,000 in punitive damages against Union Pacific).

and found a range from $1,000 to $250,000.[73] Respondent's conduct in this case was quite egregious, as described above, so I believe that a significant award of punitive damages is justified. In the last few years, Respondent has been assessed punitive damages in several similar cases, including two cases in which $100,000 awards were made.[74] Had Respondent been aware of those two cases at the time of the events at issue in this case, I would certainly impose a higher amount of punitive damages, but in fact, the events at issue in this case were nearly contemporaneous with the events in those cases and the decisions were not issued until years later.[75] In addition, since the events at issue in this case, many FRSA whistleblower cases have been decided, many of which awarded punitive damages, but Respondent cannot be said to have had notice of these decisions at the time it made the decision to discipline and terminate Complainant. Though Respondent undoubtedly had notice of whistleblower law, it did not have notice of the numerous whistleblower cases that have been decided in the last five years. Therefore, I find that punitive damages in the amount of $100,000 are appropriate. This amount reflects the reprehensible behavior of Respondent, but also takes into account the fact that Respondent was not yet aware of the significant developments in the law over the last several years at the time of the events in this case. I am optimistic that Respondent has now learned its lesson, and if it persists with this illegal course of conduct it will almost certainly be subject to increasingly higher punitive damages awards in the future.

As a final note, I will acknowledge that OSHA chose to award $150,000 in punitive damages in this case, though it did not explain the rationale behind this award. (ALJX 2.) Because this is a *de novo* review, I am not obligated to evaluate the adequacy of OSHA's award and would be unable to do so since OSHA offered no explanation for how it arrived at $150,000. Based on my understanding of the law as applied to the facts of this case, I believe $100,000 is appropriate.

4. Complainant is Entitled to Recover Attorney's Fees and Costs

The FRSA provides that an employee who prevails in a whistleblower action is entitled to recover litigation costs and reasonable attorney fees. 49 U.S.C. § 20109(e)(2)(C). Complainant asserts that he is entitled to $171,076.67 in attorney's fees and $16,473.66 in litigation costs for a total of $187,540.33. Respondent does not dispute its liability for attorney fees. Therefore, Complainant is entitled to recover attorney's fees and costs of litigation. Complainant's counsel

[73] *See Winch v. CSX Transportation, Inc.*, ALJ No. 2013-FRS-014 (ALJ Dec. 4, 2014) ($5,000 in punitive damages); *Raye v. Pan Am Railways Inc.*, ALJ No. 2013-FRS-084 (ALJ June 25, 2014) ($250,000 in punitive damages); *Nagra v. National Railroad Passenger Corp. (Amtrak)*, ALJ No. 2012-FRS-074 (ALJ Oct. 29, 2013) ($35,000 in punitive damages); *Vernace v. PATH*, ALJ No. 2010-FRS-018 (ALJ Sept. 23, 2011) ($1,000 in punitive damages); *Anderson v. Amtrak*, ALJ No. 2009-FRS-003 (ALJ Aug. 26, 2010) ($100,000 in punitive damages); *Santiago v. Metro-North Commuter Railroad Co., Inc.*, ALJ No. 2009-FRS-011 (ALJ May 16, 2013) ($40,000 in punitive damages); *Rudolph v. National Railroad Passenger Corp. (Amtrak)*, ALJ No. 2009-FRS-015 (ALJ Mar. 14, 2011) ($5,000 in punitive damages); *Cain v. BNSF Railway Co.*, ALJ No. 2012-FRS-019 (ALJ Oct. 9, 2012), ARB No. 13-006 (ARB Sept. 18, 2014) ($250,000 in punitive damages reduced to $125,000 on appeal).

[74] *Griebel v. Union Pacific Railroad Co.*, ALJ No. 2011-FRS-011 (ALJ Jan. 31, 2013); *Petersen v. Union Pacific Railroad Co.*, ALJ No. 2011-FRS-017 (ALJ Aug. 7, 2013).

[75] Complainant was terminated on August 14, 2009. The complainant in *Griebel* was terminated on November 3, 2009, and the complainant in *Petersen* was disciplined around September 2009. *Griebel*, ALJ No. 2011-FRS-011 at 7; *Petersen*, ALJ No. 2011-FRS-017 at 6. The decisions in *Griebel* and *Petersen* assessing punitive damages were issued on January 31, 2013, and August 7, 2013, respectively.

is instructed to submit a fully supported application for costs and fees to Respondent's counsel and the undersigned ALJ, as outlined below.

CONCLUSION

In conclusion, I find that Respondent violated the FRSA's employee protection provisions by retaliating against Complainant for engaging in protected activity. Specifically, Complainant engaged in protected activity by reporting an injury and a locomotive defect, and Respondent was aware of the protected activity. Complainant suffered adverse actions when Respondent investigated and eventually terminated him, and Complainant's protected activity was a contributing factor to these adverse actions. Respondent did not show that it would have taken the same action in the absence of any protected activity. As a result of Respondent's violation of the FRSA, Complainant is entitled to $25,000 in compensatory damages for emotional distress and $100,000 in punitive damages.

ORDER

Based on the above findings of fact and conclusions of law, it is ORDERED that:

1. Respondent, Union Pacific, shall pay Complainant, Tommy Lee Harvey, $25,000 in compensatory damages for emotional distress.
2. Respondent, Union Pacific, shall pay Complainant, Tommy Lee Harvey, $100,000 in punitive damages.
3. Counsel for Complainant shall file and serve by March 13, 2015, a fully supported application for costs and fees to Respondent's counsel and to the undersigned Administrative Law Judge. Within 20 days thereafter, Respondent's counsel shall initiate a verbal discussion with Complainant's counsel in an effort to amicably resolve any dispute concerning the amounts requested. If the two parties agree on the amounts to be awarded, they shall promptly file a written notification of such agreement. If the parties fail to amicably resolve all of their disputes, the Claimant's counsel shall file and serve by April 10, 2015, changes agreed to during his discussions with Respondent's counsel and shall set forth in the Final Application the final amounts he requests as fees and costs. Respondents' counsel shall file and serve by April 30, 2015, a Statement of Final Objections. The Claimant's counsel may file a reply by May 14, 2015. No further pleadings will be accepted unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed.
4. The parties are ordered to notify this Office immediately upon the filing of an appeal.

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. 29 C.F.R. § 1982.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue NW, Washington DC 20210-0001. 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. 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. 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 and on the Associate Solicitor, Division of Fair Labor Standards. 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. 29 C.F.R. §§ 1982.110(a) and (b).

Digitally signed by Jennifer Gee
DN: CN=Jennifer Gee,
OU=Administrative Law Judge, O=Office of Administrative Law Judges, L=San Francisco, S=CA, C=US
Location: San Francisco CA

JENNIFER GEE
Administrative Law Judge