UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 22 June 2012

CASE NO.: 2011-FRS-00022

_____

In the Matter of:

MARCUS KRUSE,
Complainant,

v.

NORFOLK SOUTHERN RAILWAY CO.,
Respondent.

_____

Before: Colleen A. Geraghty, Administrative Law Judge

Appearances:

Robert B. Thompson, Esq., Harrington, Thompson, Acker & Harrington, Chicago, IL for the Complainant

Joseph P. Sirbak, Esq., Buchanan Ingersoll & Rooney, Philadelphia, PA for the Respondent

DECISION AND ORDER

I. Statement of the Case

This case arises from a complaint filed by Marcus Kruse ("Complainant") with the Department of Labor's Occupational Safety and Health Administration ("OSHA") against Norfolk Southern Railway Co. ("Respondent" or "NS") under the employee protection provisions of the Federal Rail Safety Act (the "FRSA"), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. 110-53, 121 Stat 266 (Aug. 3, 2007). Complainant alleges that Respondent threatened, investigated and suspended him for thirty days in retaliation for an injury he suffered on the job. On June 3, 2011, the Secretary of Labor ("Secretary"), acting through her agent, the Area

Director of the U.S. Department of Labor for OSHA, found Respondent did not violate the FRSA. By letter dated June 29, 2011, Complainant objected to the Secretary's findings and requested a *de novo* hearing before the Office of Administrative Law Judges ("OALJ").

A hearing was held before the undersigned Administrative Law Judge in Detroit, Michigan on December 1, 2011, at which time all parties were afforded the opportunity to present evidence and arguments. Both parties were represented by counsel. The Hearing Transcript is referred to herein as "TR." Documentary evidence was admitted as Joint Exhibits ("Jt. Ex.") 1-12, and Norfolk Southern Exhibits ("NS Ex.") 1-6, 8[1] were also admitted. TR 6, 68, 165, 169-71, 192, 232. The Respondent offered two additional exhibits, NS Exs. 12 and 15, to which the Complainant objected. TR 238-40, 247-52. The Complainant's objection to NS Ex. 12 was sustained.[2] TR 240. An off-the-record conversation to address NS Ex. 15 was held and summarized on the record, and it was agreed that NS Ex 15 would come in but the record would be kept open post-hearing to allow the Complainant to depose Joseph Boswell, if the Complainant so chose, and if Complainant took Mr. Boswell's deposition then additional time would be provided for the Respondent to introduce additional evidence in rebuttal to the Boswell deposition.[3] TR 251-52. The record is now closed. The Complainant, and NS employees Jack Lawson, Joseph Eveland, Steve Myrick and David Arnovitz testified at the hearing. The parties submitted post-hearing briefs ("Compl. Br." and "Resp. Br." respectively).

Following the submission of briefs, Complainant's counsel mailed a copy of an Administrative Review Board ("Board") decision, issued on February 29, 2012: *DeFrancesco v. Union Railroad Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009 (ARB Feb. 29, 2012). On March 27, 2012, the Respondent's counsel moved for leave to File Response Post-Hearing Brief to address alleged misstatements of the record in Complainant's initial brief, and the *DeFrancesco* decision, and attached its reply brief ("Resp. Reply"). On March 29, 2012,

---

[1] NS's Exhibits are not paginated as submitted. Page numbers referenced in this Decision and Order were marked by this office.

[2] The Respondent's exhibits are not numbered in sequential order because Respondent numbered its exhibits prior to the hearing and did not seek to have all the exhibits it had pre-numbered admitted at the hearing.

[3] A post hearing conference call was held on the record on December 7, 2011. The Complainant's counsel stated that after reviewing his cross-examination of Respondent's witnesses he determined he did not need to depose Mr. Boswell in response to NS Ex. 15 and he notified Respondent's counsel that he would not depose Mr. Boswell. (Conf. Call Tr. Dec. 7, 2011.) Respondent's counsel immediately noticed Mr. Boswell's deposition, and deposed him. Based upon its own deposition of Mr. Boswell, Respondent then sought to take depositions of six additional NS employees, none of whom had been listed on Respondent's pre-hearing witness list. (*Id.* at 5-8.) The Complainant objected. The record in this case was kept open to allow the Complainant to call Mr. Boswell in order to respond to NS Ex. 15, which had been created close to the time of the hearing and to which the Complainant had not had an opportunity to respond. When the Complainant elected not to depose Mr. Boswell, the record closed. (*Id.* at 10-11.) Respondent did not seek leave at the hearing to keep the record open for it to take Mr. Boswell's deposition nor did NS seek such permission at any point prior to taking Mr. Boswell's deposition, once Complainant declined to depose Mr. Boswell. I denied Respondents request to take six additional depositions post-hearing. Respondent's attorney then made a proffer regarding the six additional depositions he wished to take. (*Id.* at 13-17.)

Despite this conference call, the Complainant attached a copy of Mr. Boswell's deposition to his brief and both parties reference Mr. Boswell's deposition in their briefs. However, neither party has asked that it be introduced into evidence. The record closed at the end of the formal hearing once the Complainant declined to take Mr. Boswell's deposition. Therefore, Mr. Boswell's deposition is not in evidence.

Complainant filed a Response to Respondent's Motion to File Additional Brief. The Respondent's motion was granted, and the Complainant submitted his response to post-hearing brief of Respondent on April 9, 2012. ("Compl. Reply").

II. Issues

The parties stipulated that the only issues in dispute were: (1) whether the Complainant's reporting a work injury on March 31, 2010 was a contributing factor in the railroad's decision to suspend him on a charge of excessive speeding; and (2) if so, whether the Respondent can establish, by clear and convincing evidence, that it would have taken the same adverse action regardless of the protected activity. TR 6-7.

III. Stipulated Facts

The parties submitted the following Joint Pre-Hearing Stipulations:

> 1. Mr. Kruse is a conductor employed by Norfolk Southern, and has been since 2003. At the time in question, Mr. Kruse was working on the L61 assignment.
>
> 2. Mr. Kruse reported an injury to his chest on March 31, 2010, while throwing a switch, and was cleared to return to work on August 9, 2010.
>
> 3. On or about August 9, 2010, Mr. Kruse attended a return-to-work meeting with David Arnovitz, the Detroit Terminal Superintendent.
>
> 4. The Milan Running Track, where the L61 crew typically worked, is subject to restricted speed, meaning that the crew must operate at a speed enabling the train to stop within one-half the range of vision, but in no event greater than 15 miles per hour.
>
> 5. Engineer Jack Lawson waived his right to attend an investigatory hearing and received as discipline a 30-day suspension for excessive speeding on September 7, 2010.
>
> 6. An internal investigatory hearing consistent with the applicable collective bargaining agreement was held on October 1, 2010 before hearing officer David Arnovitz. Following the investigatory hearing, Mr. Kruse was assessed as discipline an actual time off 30-day suspension for excessive speeding on September 7, 2010.
>
> 7. A Public Law Board upheld the finding of excessive speeding but reduced Mr. Kruse's discipline to a 30-day deferred suspension, with pay for all time lost.
>
> 8. Mr. Kruse filed a whistleblower complaint under the FRSA with OSHA on or about January 18, 2011 and appealed OSHA's

determination that Norfolk Southern did not violate the FRSA on June 29, 2011.

(Jt. Stip. ("Stip."), Nov. 22, 2011.)

IV. Summary of the Evidence

A. Testimony of the Complainant Marcus Kruse

The Complainant has worked for NS since May 2003, when he was hired and trained as a conductor, though he also worked as a train dispatcher for approximately a year and a half. TR 17-18. The Complainant explained that there are different classes of conductors, but his particular job was as a "local road switcher" on the Milan running track. TR 18, 23-24, 27. There are two shifts at this location, and the Complainant worked the afternoon, L61 shift.[4] TR 24; Stip. ¶ 4. The morning shift has three people on crew, but the afternoon shift only employs two, Jack Lawson as an engineer, and the Complainant as a conductor. TR 24. He has worked in this job for approximately four or five years. TR 24.

The L61 shift is paid on a "trip rate," meaning that the conductor and engineer are paid the same amount whether they complete their work in four hours or eight. TR 45. They are paid overtime for working more than eight hours. TR 45. The Complainant testified he does not get to leave work whenever he wants: "I make sure all my customers are satisfied prior to doing that." TR 63.

As a conductor on the L61 assignment, the Complainant services a variety of industries, and maintains paperwork to ensure that train cars are handled appropriately and get to the correct destinations. TR 18-19. Among his other duties, the Complainant has to ensure that his paperwork reflects the correct order of the railcars, be vigilant for obstructions along the track and remain observant of other trains on the main line. TR 62. The Complainant is also responsible for performing "job briefings," which he does several times a day: "I conduct them at the beginning of our shift, basically I conduct[one] any time the work changes . . . . When we do each and every industry, typically we talk about the work to be done, the conditions the work will be done under . . . ." TR 46.

The Milan running track is between three and four miles long, generally runs east to west and has a restricted speed limit of fifteen miles per hour. TR 27-29. There are two industries off the Milan runner, as well as a siding for interchanging cars with Detroit. TR 28. Someone has to call the dispatcher and get permission whenever the L61 goes onto or leaves the Milan running track. TR 28. This means that there is a record of when, exactly, the L61 enters and leaves the Milan running track. TR 29.

When the train is moving eastward on the Milan running track, the engine is in front pulling the railcars, and the Complainant, as a conductor, would typically be in the engine with

[4] The shift to which the Complainant and Jack Lawson were assigned is the "L61," and this is also used to refer to the entire train. The engine Mr. Lawson actually drove is number 5319. *See* Stip. ¶ 4; Jt. Ex. 9.

the engineer. TR 30-31. When the train is moving westward, the engine is behind the cars, "shoving" them forward, and the Complainant would be either at the opposite end of the train or on the ground "walking ahead of the movement, or . . . possibly west of the train at a joint where we need to make[] ties with cars and whatnot." TR 30, 31-32. The Complainant explained it is the conductor's job "to always be at, on or ahead of the leading end of the movement [of the train]." TR 32. However, this does not mean the Complainant is always right next to the train, he could be 600 feet away or farther. TR 49.

The Complainant explained that the Milan runner job is a local job which is different from a "road job, . . . [which] would be take a train from point A to point B, stay the night, and when you're rested or when they have a train, to come back from point B to point A. You work between two points . . . ." TR 36. According to the Complainant, the engines on road jobs are typically equipped with a second speedometer on the conductor's side of the engine, and thus the conductor knows exactly how fast the train is going. TR 36-37.

The Complainant acknowledged that a part of his job entails ensuring that NS's rules are followed, and he insisted that every employee of NS shares this responsibility. TR 19, 46. He said he conducts a job briefing when he is aware of a rule violation, but that he cannot conduct a job briefing if he was not aware of the violation. TR 20. In his opinion, there is no way to tell the speed of the L61 within ten miles per hour without a speedometer, particularly while it is on the Milan runner. TR 34, 36-40. Engine number 5319 does not have a separate speedometer for the conductor, and the conductor cannot see the engineer's speedometer without getting up and walking around to the engineer's side of the train. TR 35, 40. Moreover, the Complainant testified that he was never trained on how to tell the difference between fifteen and twenty-one miles per hour, and he has never been tested on his ability to estimate speed. TR 40.

The Complainant said that he could not tell the speed of the train by feel, in part because the Milan track is a "ribbon rail," meaning that it is "very smooth, no clickety-clack like you would . . . see in the movies. . . . It's just smooth, it doesn't make any sound really, just a very smooth track." TR 35-36. Nor can the Complainant gauge the speed of the train by fixed markers or landmarks along the train line: "[i]t's a featureless landscape. There's, besides two industries, it's nothing but cornfields." TR 37-39. There are mile-markers that can be used to measure a train's speed over a mile, but they are on the engineer's side of the train, and even if they were on the conductor's side, one cannot establish the speed of a train until after it had traveled an entire mile. TR 37-38. Therefore, the only way the Complainant could establish the speed of the train was by conducting a job briefing, i.e. by asking Mr. Lawson how fast they were going, or by getting up and walking behind Mr. Lawson to look at the speedometer. *See* TR 19, 40.

The Complainant testified that NS Rule 1080 prohibits a conductor from getting up and moving around the engine while it is moving. TR 39-40. He testified that this rule permits a conductor to get up in "an emergency situation . . . . There's also a rule that states you must take the safest course of action." TR 61. He testified that he has gotten up to use the bathroom when working on a road job, but had probably never done so on the L61 assignment. TR 60-61.

1. *Injury & Return to Work*

The injury the Complainant sustained on March 31, 2010 occurred while he was operating a switch, which he described as "completely frozen, rusted solid." TR 51. One of the supervisors to respond to the incident was Joe Eveland, who offered to take the Complainant to the hospital. TR 50. He also asked the Complainant to fill out a Form 22, which is for reporting a personal injury.[5] TR 50-51. The Complainant acknowledged that his supervisors encouraged him to fill out the Form 22, and he testified that he did not feel like he was being retaliated against at the time of the injury. TR 51. He was never investigated or disciplined formally with regard to the incident. TR 51-52. The Complainant acknowledged that NS employees are trained to not overexert themselves when operating a switch, though he was uncertain whether doing so would be a rules violation. TR 52. However, he insisted that he did not overexert himself. TR 51.

After the Complainant's work injury on March 31, 2010, he did not return to work until August 11th. TR 20. Prior to returning to work he was required to get clearance from the medical department and speak to a supervisor. TR 20-21. The Complainant testified that he met with David Arnovitz on either August 9th or 10th, and he did not recall anyone else being present during his meeting with Mr. Arnovitz. TR 21. The Complainant testified that Mr. Arnovitz "basically looked at . . . my whole . . . career service record as it indicates . . . injuries I had. It was stated that I had three injuries or incidences, that I can ill afford to have another, that, you know, I need to watch my p's and q's because I will be watched." TR 22. The Complainant also testified that Mr. Arnovitz said that injuries were "not tolerated," and that the Complainant could "ill afford to have another [injury]." TR 22, 56. He acknowledged, though, that Mr. Arnovitz would probably like to see all of his employees go injury free. TR 56.

The Complainant also remembered meeting with Steve Myrick around this time, but he recollected that he met with Mr. Arnovitz alone at the initial meeting and Mr. Myrick later. TR 53. He later said that Mr. Myrick may have even come earlier or later, he did not have a clear recollection of the timeline, but that he was certain that he met with Mr. Arnovitz alone. TR 55. The Complainant recalled that Mr. Myrick informed him that he was going to be observed as an aspect of returning to work, but his recollection was that this occurred during a different one-on-one meeting with Mr. Myrick, than the one with Mr. Arnovitz. TR 55.

Upon returning to work, Complainant felt he had a target on his back. TR 22. Prior to his injury, he stated he only saw management personnel show up to monitor his performance "once, twice a month, but more so once every three months." TR 24. He was never called about his job duties on a regular basis prior to his March 31st injury. TR 25.

Immediately after returning from his injury, the Complainant testified that he was regularly visited on "basically a daily basis for the first nine, ten days. And then after that, probably every other day [] until I was pulled out of service . . . it was very frequent." TR 25. He also testified to receiving telephone calls almost every day, usually from Steve Myrick, and

[5] The Complainant indicated that hospitalizations are reported differently than other injuries: "it's an incident report I guess, accident/incident report. It's not a reportable injury at that point, no. . . . You fill that out whether you go to the hospital or not." TR 50-51.

seeing suspicious cars parked around the train yard and along the rail line. TR 25-26. He testified that his suspicion was raised by the presence of the vehicles because "Milan is a small town. . . . [W]hen you see a vehicle in the middle of nowhere, there is nothing but a road with cornfields around, you don't typically see vehicles sitting around too much. Things stick out a lot easier than if you were somewhere else." TR 26.

The telephone calls the Complainant received from Mr. Myrick largely involved "[j]ust checking in . . . . [W]hat do you got for work today, you know, make sure you work safe today, . . . have your protective footwear or whatever it may be, you know, or wear your safety glasses." TR 57. The Complainant testified that Mr. Myrick "is typically a fairly laid-back guy. . . . He's just a, he's a great boss to have . . . ." TR 56. The Complainant testified that when Mr. Myrick actually visited the worksite, Mr. Myrick spoke with both the Complainant and Mr. Lawson. TR 57. However, the Complainant typically answers the phone, and he would talk to Mr. Myrick alone. TR 57. He did not recall any instances in which Mr. Myrick asked to be put on speakerphone. TR 58. The Complainant was not aware of whether other crews were being contacted daily; typically when there is an injury or a fatality all of the crews would be contacted, but the contact after his return to work was different. TR 58.

2. *Speeding Charge & Discipline*

The Complainant was charged with and disciplined for excessive speeding on September 7th.[6] JX 10. Complainant was charged along with the engineer Mr. Lawson because the train was travelling at twenty miles per hour for fifteen seconds and twenty one miles per hour for six seconds while the Complainant was on the engine. TR 38, Jt. Ex. 5. The Complainant first learned he was being charged for speeding when he showed up to work on or about September 14, and an extra crew person was at his reporting location to work. TR 26. Complainant called his train master, Steven Myrick, and was told that he needed to contact Joe Eveland. TR 26. Joe Eveland told Complainant that he was being taken "out of service"[7] for speeding six times during the prior week. TR 26-27. The Complainant and Mr. Lawson were only charged for one instance of speeding on September 7th; this was the only time the train had been speeding while heading west. TR 26-27. In other words, they were charged only for the one time the Complainant was actually in the engine with the engineer, Mr. Lawson.

The Complainant does not dispute that the train was, in fact, speeding on September 7th. TR 45. However, he does not believe that he was at fault for the speeding that occurred. TR 40.

The Complainant knew there had been a WERIS[8] report stemming from an incident on September 3rd: "Jack [Lawson] talked to somebody about, I wasn't paying much attention to it,

[6] Excessive speeding is defined by NS rules as speed five miles or more above the maximum authorized speed limit. JX 2.

[7] Out of service is another term for suspended without pay. TR 27.

[8] WERIS stands for "Wireless Electronic Remote Information System." TR 145. The WERIS records data about the use of the engine and when the train pulls into the yard the information is uploaded to the WERIS center in Atlanta. If the data indicates issues such as misuse of the independent brake, stalls, stretch braking, a discussion is had with the engineer. TR 77-78, 97, 145-146.

I don't know exactly what it entailed, but I was aware that something was said to it and I thought that was it." TR 34-35. The Complainant was not involved in events triggering the WERIS report on September 3rd because he was on vacation that day. TR 35.

For speeding on September 7th, the Complainant received a thirty day suspension, which was categorized as a "start[9] major," "which is the strictest form of discipline that [NS] can [issue] on paper." TR 41. The Complainant testified that he had been told he would receive a less severe "serious." TR 41. Further, the Complainant understood that a start serious would be removed from his record after two years, and a start minor would be removed after one year.[10] TR 64, 66. Through a separate proceeding under the collective bargaining agreement the Complainant's discipline was reduced to a deferred thirty day suspension, and he was eventually paid for the time he missed.[11] TR 43. However, the start major remained on his record, and the Complainant testified that he was not able to immediately return to the L61 assignment. TR 42-43. The Complainant's concern over the start major is that, because it remains on his record forever and "they can dismiss [him], no questions asked basically," should he ever get another major discipline. TR 64.

The Complainant testified that being pulled out of service without pay caused a financial and emotional hardship for both him and his family. TR 43.

> Financial, I mean you don't know, you have to worry. . . . I'm the sole provider for my family, so the emotional toll of not knowing where your next paycheck is going to come from at the time and, you know, not feeling very good about yourself. And my wife worried, you know, what are we going to do and how we were going to do it.

TR 43.

B. Testimony of Jack Lawson

Jack Lawson has been employed by NS or its predecessors since February 1979. TR 71. He has worked as a switchman, yard switchman and conductor, and he has been an engineer since October 1992, although he works as a conductor a few times a year. TR 71. He has worked the L61 job for approximately twelve years, five as a conductor. TR 72. He testified that he has worked with the Complainant on the L61 job for about three years. TR 73, 98. Mr. Lawson worked with the Complainant on March 31, 2010, when the Complainant was injured, and he was working when the Complainant returned to work in August 2010. TR 72-73. Mr.

---

[9] START "stands for System, Teamwork and Responsibility Training," and it is a disciplinary program "which is completely outside the collective bargaining agreement." TR 234 (testimony of David Arnovitz).

[10] During cross-examination, the Complainant expressed surprise when he was shown a copy of his disciplinary history, which still listed two start minors dating back to 2005 and 2006. TR 67. He testified that he had been told that these incidents "were gone." TR 68-69.

[11] As a result of the reduced discipline following arbitration, the Complainant was paid his salary for the thirty day suspension period and he is not seeking lost wages in this proceeding. TR 59-60, 239-40.

Lawson confirmed that the engine faces east, with the train stretched behind it westward. TR 81-82. Therefore, if the downloaded engine report shows reverse, it means that the train is heading west. TR 82.

1. *Supervision*

Mr. Lawson testified that typically, Mr. Myrick would visit once, sometimes twice a month to "make sure things were going, you know kind of talk a little about safety with us and that kind of thing." TR 73. A road foreman would usually "come about every other month . . . ." TR 73-74. Mr. Lawson also said that there would occasionally be "an out-of-towner" perhaps once every six months. TR 74.

After the Complainant returned from his injury, Mr. Lawson testified that there were "a lot more of visits with out-of-towners being brought in by Joe Eveland, and other people just coming in and watching us." TR 74. His estimate is that there were approximately ten visits within thirty days, as opposed to two to three visits typically. TR 93. He said that they also received more phone calls, but that he did not know from whom or how often because dealing with the phone is the conductor's job. TR 93-95. He remembered speaking to Mr. Myrick a couple of times over the phone, but Mr. Myrick would have spoken to each of them separately and never over the speakerphone. TR 94-95.

When supervisors appeared in person, they would talk to Mr. Lawson and the Complainant together "about safety or what work we were doing and how we were doing it and that they had been watching us, they observed how we had worked and this kind of stuff." TR 95-96. They never said anything about not reporting injuries. TR 96.

He also confirmed the Complainant's testimony regarding strange SUVs: "it also seemed like they usually [] drive white vehicles like a Jeep Cherokee or the Ford comparable to that, and it seemed like we were seeing more of those in that time frame, too." TR 74. Mr. Lawson could not tell for certain that these vehicles were supervision and not "just people off the street." TR 92. Nonetheless, he concluded that the L61 job was being heavily watched. TR 75-76.

2. *WERIS Alert & Speeding Charge*

Mr. Lawson testified that he was charged with excessive speeding and pulled out of work approximately a week after September 7th. TR 77. He believed that there were three or four instances during which he had been going more than twenty miles an hour, though he could not give an "exact count on the rest of them." TR 83. He knew that only one of the instances of speeding involved an eastward movement, and that the Complainant would not have been in the locomotive during a westward movement. TR 83-84. He testified that he and the Complainant never discussed speed on the 7th. TR 89.

Mr. Lawson said that a WERIS report is "a satellite thing that watches what the trains do. It watches all the trains and [can] pull down what's going on on the engine, and it's supposed to be a training tool that the company can use." TR 77-78. His understanding is that "the WERIS report is to be used as a training tool to let the engineer know when he's doing something he

shouldn't and they contact you and talk to you about the incident." TR 97. Based upon his experience as the president of the union local, an engineer has never been disciplined solely upon a WERIS report. TR 97-98. Rather, NS would first download the event report. TR 100. Mr. Lawson testified that a lot of people are allowed to access and download the event reporter, it does not have to be the road foreman. TR 100.

Mr. Lawson testified that he received a call, based on a WERIS alert, about "using the independent brake on the train" on September 3rd. TR 78. The Complainant was not working with him that day. TR 78. Mr. Lawson explained that the WERIS system was actually wrong in this instance, and that his use of the independent brake was appropriate. TR 79-80. He explained why he used the independent brake and where and the issue was dropped by NS. TR 80. He was also informed at this time that he had reached twenty-three miles an hour at the time the independent brake was used on September 3rd. TR 85.

Regarding the speeding incidents that occurred during the week of September 7th, Mr. Lawson was relieved he was "only getting charged with one instead of multiple charges." TR 84; Jt. Ex 5. However, he thought that "it was very obvious to me that they wanted to make sure they got the conductor, not just me but the conductor." TR 85. He also did not understand why they never even talked to the conductor who was riding with him on September 3 when the WERIS alert was triggered, as "he was on the engine because that was an eastward direction also. And he never even got any kind of phone call." TR 85. Mr. Lawson took a "waiver," meaning that he did not contest the thirty day suspension: "I mean, I had no defense, I was guilty." TR 85.

After Mr. Lawson returned from his thirty day suspension he noticed a "major decrease" in the level of supervision on the job. TR 85.

3. *Gauging Speed without a Speedometer*

Mr. Lawson confirmed that Engine number 5319 did not have a speedometer that the conductor could see, but that almost ninety-nine percent of road engines had speedometers either on the conductor's side of the engine, or that the conductor could see. TR 86. He also said it was not usual for a conductor to actually get up from his seat and check the speedometer. TR 88-89. He opined that there was no way for a conductor on the Milan runner to determine the speed of the train by feel or sense, because the runner is a ribbon rail and all of the telephone poles and mile markers are on the engineer's side of the train. TR 87-88. He especially believed that it was impossible to determine the speed of the train between fifteen and twenty miles an hour without a speedometer. TR 89-90.

In fact, he testified that gauging a train's speed within ten miles an hour would be very difficult for a conductor because they do not have the opportunity to be constantly checking the appearance of the speed against the actual speed reflected on the speedometer:

> [I]t would be pretty tough to even [tell between] 15 to 25, you're only talking ten-mile-an-hour difference. It would be really tough, you'd have to get over I think 25 really to be able to tell a big difference. . . .

> As an engineer, it's going to be a little bit [easier] for an engineer to be able to do that than would be a conductor because a conductor don't have a speedometer to watch all the time to know what the speeds are in the yard like that. So, a yard conductor [like the Complainant] would not have the option because he's riding the point as much as he's riding the engine.

TR 90. Mr. Lawson knew of one person who "could literally count the ties and watch his watch and know how fast he was going." TR 91. However, Mr. Lawson testified that if he tried to do that, he would "end up throwing up. . . . That's why you have test miles . . . ." TR 91.

C. Testimony of Joseph Eveland

1. *Work Background*

Joseph Eveland started working for NS in May of 1998 as a conductor, and after a little more than a year as a conductor, was promoted to engineer. TR 102-03. Approximately a year after that, Mr. Eveland went into management as an assistant train master, and he has been a road foreman of engines out of Fort Wayne, Indiana since 2004. TR 103. Mr. Eveland explained that he has been assigned to at least four different districts associated with Fort Wayne: "I have been at Fort Wayne to Cincinnati, Fort Wayne to Chicago, Fort Wayne to Detroit, Fort Wayne to Bellevue. So, that's from 2004." TR 105-06. He had supervision over the Milan yard for about a year around 2010. TR 104.

As a road foreman he is responsible for educating and training engineers to comply with NS safety rules and efficient operation of trains. TR 145. Though he primarily supervises engineers, as an officer with NS, he also supervises conductors, Remote Control Operators (RCO's), and "pretty much any of the [train and engine employees]." TR 145; *see also* TR 116.

Mr. Eveland testified that his compensation includes a bonus and a merit increase, and that safety and derailments are an aspect of these. TR 133. However, he explained that the bonuses are determined across the company, meaning that an individual supervisor's bonus is not going to be higher or lower based upon how many injuries were reported under his or her watch. TR 134. He added that he has been in districts where "we haven't had any injuries and, you know, had gotten a smaller bonus or a smaller merit increase. So, no, safety injuries are not a factor in that. It's a pride thing I think as far as Norfolk Southern is concerned." TR 135.

2. *Gauging the Speed of a Train*

Mr. Eveland testified that he could tell the difference between fifteen and seventeen miles an hour on a locomotive, but could not tell the difference between fifteen and twenty miles an hour in a car. TR 131. He is able to do this by "the feel of it," saying that as an engineer "[y]ou can look at the trees, you can look at the siding or the gates when they go down, when you go across the crossing, you just have a general feel for it." TR 135. At first Mr. Eveland went so far as to say that "everyone's" able to tell the speed of a train by feel, but he clarified that he

meant "a crew that had been working that for a period of time would know the difference between 15 mile per hour and 20 mile per hour." TR 162.

Because Mr. Kruse had worked the Milan job for several years, Mr. Eveland believed "without a doubt" that the Complainant could have gauged the speed of the train. TR 161-62. In support of this assertion, Mr. Eveland noted that Mr. Kruse had a Remote Control Operator (RCO) license, stating that "he's familiar with operating an engine and being on the engine, that he would know the speed. You would just feel it." TR 162. He later conceded, though, that a RCO would never actually have to guess the speed of a train, because he would have actually just input the speed into the remote control. TR 179-80.

Despite this testimony, Mr. Eveland was unable to say how long it would take to judge a train's speed. At his deposition, Mr. Eveland had said that he could not say whether it would take more or less than ten seconds to tell if a train was speeding. TR 132. At the hearing, he initially testified that a conductor should be able to tell immediately when a train has exceeded the speed limit, but he subsequently changed his hearing testimony to match his deposition testimony.[12] TR 131-32.

Mr. Eveland confirmed that road engines typically have speedometers on the conductor's side as well as the engineer's. TR 124. When asked why NS would go through the expense of equipping the conductor's side of an engine with speedometers if conductors are supposed to be able feel the speed, Mr. Eveland responded: "I feel as though that you're capable of telling the difference between 15 and 20 mile[s] per hour. I'm not saying that I'm a speedometer keeping track of all speedometers on all engines. I don't think anybody's got that capability . . . ." TR 177. Again, he testified that he did not know how long it would take to perceive a five mile an hour difference in speed. TR 177.

3. *The WERIS Alert and Speeding Investigation*

Mr. Eveland found out that the Complainant had been on a speeding train as a result of the WERIS alert triggered September 3. TR 145-46. He explained that the WERIS system constantly records everything about an engine, and when it pulls into the yard all of the information is uploaded to the WERIS center in Atlanta. TR 145. All of the data is run through filters to check if there is anything that needs to be discussed with the engineer: "misuse of the independent brake, stretch braking, stalls, you know, in other words wasting fuel." TR 146. Mr. Eveland said that the "process is all for the education of our engineers, really try to lean towards more train efficient handling." TR 146. Furthermore, an engineer may not be disciplined based upon a WERIS alert alone. TR 149. "We use the[] WERIS as an alert, and that's all it is [] an alert to let the road foreman know that something has occurred, a violation has occurred. And now it's up to the road foreman to physically go to that locomotive and download the event recorder." TR 149. Any violations from the WERIS alert have to be verified by a download from the event recorder. TR 150.

[12] "Q: Okay. Do you recall being asked that question and you said I don't have an answer for that? A: That's correct. Q: Does that remain[] your answer today? A: That's correct." TR 132.

Typically, when a WERIS alert is triggered, it is given to the road foreman for the district right away. TR 104. At his deposition, Mr. Eveland had believed that he had been on vacation on September 3, 2010, when the WERIS alert was triggered by Mr. Lawson's use of the independent brake. TR 104. He testified at the hearing, however, that the real reason he did not get the WERIS alert immediately was that he was not actually assigned to cover the Milan yard at that time. TR 104-05. After his deposition, Mr. Eveland checked with the division road foreman, Joseph Hall, about what had been going on in early September 2010. TR 107, 109. Mr. Eveland then testified that "[i]n September during the WERIS alert, I was in the Newcastle district, probably would not have gotten back to the Detroit-Huntington side until maybe October-November, I'm not sure what the exact date is." TR 108.

Mr. Eveland testified that the WERIS alert for September 3, for Engine number 5319 on the Milan running track, was assigned to him on September 11th because someone had determined that there had been speeding in conjunction with the misuse of the independent brake on September 3rd. TR 110-11. He received the alert on a Saturday, and he did not get up there until the 14th because he has weekends off and Milan is three hours away. TR 146. The event recorder cannot be downloaded remotely, so someone has to physically go to the engine to complete the event recorder download. TR 147. Mr. Eveland agreed that someone else could have downloaded the event recorder, such as the officer supervisor in training for the area, Rusty Parker. TR 111. He initially testified that he could not say why he had not told someone else to download it immediately. TR 111-12. He later explained, however, that Mr. Parker would not have had the expertise to investigate and bring charges arising from the data, which is why he was brought in. TR 138. He further added that Mr. Parker "was down in Atlanta at OST [officer supervisor in training] training when he got the alert. And what had happened was our division road foreman had divided up all of the alerts on the Huntington district because we were all busy doing other tasks." TR 139. When Mr. Eveland downloaded the event recorder on September 14th, he downloaded as far back as he could, but the data only went back to September 7th. TR 112.

Once Mr. Eveland downloaded and analyzed the data, he saw "multiple instances of speeding, some of it excessive speeding." TR 151. There were six instances of excessive speeding during the week of September 7th to 14th, and in fact there were six instances in just three different days. TR 119-22. He listed all of the instances of excessive speeding on Joint Exhibit 5. TR 151. Mr. Eveland testified that he knew when the crew was on the running track as well as in which direction the train was moving. TR 117-18. He testified that when the train was headed east it would be pulling with the engine in front, and that would be the only time the conductor would be in the locomotive along with the engineer. TR 117-18. He testified that there were no instances of excessive speeding by the other crew that used the same engine. TR 154.

Mr. Eveland said that the easiest way for the Complainant to have known that the train was speeding was to conduct a job briefing and ask Mr. Lawson: "Job briefings are required and we all know at the beginning of the shift and when conditions change, we'll have a job briefing, or if there's a violation, rule violation, you know, we'll need to do a job briefing." TR 161. Mr. Eveland also testified that Mr. Kruse could have gotten up, walked over and looked at the speedometer. TR 161.

4. *How the Complainant Was Charged*

Mr. Eveland was responsible for bringing the charges against the crew for excessive speeding. TR 154, 173. Prior to charging a crew, Mr. Eveland said he reviews the data he has and presents it to his supervisor: "I will show him what we have, and then he will consult with his supervisor and make sure that we're all on the same page, doing the right thing correctly." TR 173. Mr. Eveland testified that he did not charge the crew working when the WERIS alert was triggered on September 3rd with speeding, when the train had reached twenty-three miles per hour because all he had was the WERIS alert, "and we do not discipline on basis of the alert. . . . We don't use it for any discipline or educational purpose." TR 150.

The charges were issued on September 16th against both Mr. Lawson and Mr. Kruse for speeding on September 7th. TR 155; Jt. Ex. 10. Mr. Eveland conceded that in reviewing the event recorder download there was only one occasion on which the train was speeding going in an eastward motion, meaning the Complainant was on the engine with the engineer. TR 120-21; NS Ex 5. However, Mr. Eveland's testimony vacillates between agreeing that Mr. Kruse could only have been charged when he was in the engine and saying that the crew together can be charged for all speeding violations. *See* TR 118, 121, 156-57, 160, 173-74. On one hand, upon examination by Complainant's counsel, he initially agreed that Mr. Kruse was only supposed to have been aware of the speeding during the one eastbound movement, when he would have been on the engine. TR 121. He also testified that he was only going charge "them" if he could get them both together, saying that "it's my job to find and get both of them together and they were committing the offense that way, yes." TR 118. Mr. Eveland testified: "I needed to know that both crew members were on that train at that particular time. Now, Kruse was on that train at those other times that . . . [the train] was speeding, but on this particular time, yes, that was where I could go and nail him and I did." TR 128. Mr. Eveland then rephrased, saying he "wanted to nail the crew," and not just Mr. Kruse because the crew had been "speeding throughout this whole week in multiple times, speeding, so I was just after the easiest way that I could [show that they were both on the train]." TR 128-29. He was certain that the Complainant was on the engine for the incident he charged because he had voice recording of the Complainant asking for permission to enter the running track. TR 158; *see also* Jt. Ex. 8.

Mr. Eveland testified that "the easiest way for me to make my . . . case was on [September 7th], everything fell into line, that's why I chose that day." TR 125. However, he acknowledged that he could just as easily have made out a case against Mr. Lawson, the engineer, for any of the individual instances of speeding; any time the engine is moving Mr. Lawson would be controlling it, and the fifteen mile per hour speed limit always applies to the L61. TR 126-27. Furthermore, each instance of excessive speeding by Mr. Lawson could have been a dismissible offense. TR 125. Mr. Eveland said the reason he did not charge Mr. Lawson for the other instances of speeding was that NS does not "charge each individual instance. What we do is just . . . take one instance . . . . I'm not going to pile on, hey, they were speeding several different times. I didn't want to do that, that was unfair." TR 129; *see also* TR 155. Again however, he conceded that he had never actually encountered multiple speeding violations arising from one investigation, and that there is nothing in the START policy regarding the matter. TR 125, 129; *see also* TR 181.

Upon examination by NS's counsel, he testified that he could have brought charges against the Complainant for all of the speeding violations.[13] TR 156; *see also* TR 173-74. He explained why he only charged on the 7th: "I was trying to make the best case that I could, because they were speeding, in my opinion, looking at the data and listening to the voice tapes, and interviewing the crew, that my strongest case that I could make was during this particular time." TR 157. He added that it is NS policy to charge both the engineer and the conductor for any violation that happens on the engine.[14] TR 156-57. Mr. Eveland said the reason for charging a conductor along with the engineer is that "the conductor is directly responsible for the safe and efficient movement of that train." TR 160. A conductor is "jointly responsible with the engineer, to make sure that they're complying with all operating rules." TR 160. Mr. Eveland was not aware of any cases in which a conductor was charged for speeding when he was not in the engine. TR 173-74. This absence of disciplinary precedent was part of his rationale for only charging for the one time the Complainant was on the engine because that made the strongest case. TR 173-74.

5. *Hearing and Discipline*

At NS's internal investigatory hearing, Mr. Eveland submitted the rules he believed the Complainant to have violated. TR 163; NS Ex. 6. These exhibits included rules regarding the authorized speed on the Milan runner, a conductor's authority and responsibilities[15] and conducting job briefings.[16] NS Ex. 6. Mr. Eveland testified that Mr. Lawson signed a waiver, whereby he accepted responsibility for excessive speeding, and did not contest being assessed a start major and a thirty day actual suspension. TR 165-66. Mr. Eveland testified, however, that he was not aware that excessive speeding would necessarily qualify as a major violation. TR 119.

---

[13] "Q: Could you have brought charges against the crew for other instances? A: Oh yes, during different times, at any one of those times that they were speeding, I could have charged both crew members with speeding, or excessive speeding. Q: Even if Mr. Kruse wasn't on the engine? A: Mr. Kruse would have been if there was a western movement, he would have definitely been on the train itself, protecting the shove movement on the leading end of the movement. So, and actually probably had a better feel for the speed because he's actually out there in the elements. So yes, I could have brought charges to, at any one of those instances that they were speeding, got the whole crew for it." TR 156.

[14] However, immediately after saying that NS broadly charges both the conductor and the engineer for any violations made on the engine, he goes on to talk as though the conductor must be on the engine to be charged: "We charge, in speeding incidents, with the engineer and conductor **both on the lead locomotive**, we'll charge the crew." TR 160 (emphasis added).

[15] Rule 582 in the relevant part says: "(a) Conductors have charge of trains to which they are assigned. (b) They are responsible for: 1. Safe and proper management of their train. 2. Protection and care of passengers and property. 3. Vigilance, conduct and proper performance of duty of other crew members. 4. Observance and enforcement of all rules and instructions. . . ." NS Ex. 6 at 4.

[16] According to rule GR-38, job briefings are a "(a) . . . communication between a group . . . to review: 1. Work to be performed. . . . 4. Applicable rules and procedures. . . . (b) Participation and involvement in Job Briefings are required and must be done: 1. At the beginning of each job. 2. When the work changes. 3. When the work becomes confusing or new tasks are started. 4. When a rule violation is observed." NS Ex. 6 at 5-6.

Mr. Eveland described the progression of disciplinary levels under NS's START policy. TR 113. There are three levels of offenses: minors, seriouses and majors. TR 113-15. An employee can get four minor offenses in a year before progressing to level two, serious offenses. TR 114. There are then three steps of seriouses before a person could be dismissed. TR 114. At first, Mr. Eveland agreed that a major offense is the only one that would warrant removal pending investigation and hearing, TR 116, but later changed his testimony, saying that a START serious may also warrant removal pending hearing, TR 130. He also testified that it is possible for a person to be dismissed for a single occurrence of a major violation if proven guilty. TR 116, 130.

Mr. Eveland also explained that "the [START] program is a system training, a remedial action." TR 113. He said that when he witnesses a minor violation, he would "work with the engineer or the conductor to show them where they went wrong," and "try to help them make sure they don't make that same mistake." TR 113. He described the START program as "a counseling session where . . . you identify the problem, then . . . you sit down with the individual, [and] counsel them and . . . train them . . . ." TR 113.

Mr. Eveland was not sure when, exactly, he pulled the Complainant and Mr. Lawson out of service. TR 117. He testified that before doing so he would have downloaded the data, analyzed it and gone to his immediate supervisor, Mr. Hall, the division road foreman, and that Mr. Hall would have also consulted his boss.[17] TR 117, 137. Under questioning by NS's counsel, Mr. Eveland testified that it is actually "quite common" to take an employee out of service pending an investigation. TR 136. "That's the practice. You wouldn't want an unsafe employee, not that they're unsafe but they committed an unsafe act. So, what we do is we pull them out of service pending our investigation." TR 136. Mr. Eveland said that this occurs for "not only speeding but any of the infractions . . . ." TR 137. He explained that, in the past, they had been very strict about speeding, but "we've since relaxed that rule, and now it's more or less a case by case basis, how long they were speeding. But you know, if you were speeding and it's got to a serious incident, yes, we would pull them out of service." TR 137.

Regarding the eventual discipline assessed against the Complainant, Mr. Eveland testified that because the engineer got a major, "we wouldn't assign an engineer with a major and a conductor with a lesser, so we would charge them both the same." TR 166. He added that "we'll . . . talk with labor relations and mak[e] sure that we're not excessively handling one person and not another, so we're trying to be as consistent as we can. . . . [A]nd I'm sure it's a case by case basis." TR 166.

[17] At first, Mr. Eveland had said that the decision to pull an employee out of service would have been made by his division road foreman, Joseph Hall, or the labor relations department of NS. TR 120. Later, though, he said that he would have participated at least as far as consulting with the division road foreman, Joseph Hall, regarding the decision. TR 137.

D. Testimony of Steven Myrick

1. *Background & Experience with Training*

Mr. Myrick has been an employee of NS since April of 1991. TR 182. He has been "a conductor, yard master, train master, general yard master, assistant train master" and a "chief dispatcher training coordinator." TR 182. His duties have included supervision for the last fourteen years, and he has been the train master in the Detroit/Huntington District for the last year and nine months. TR 182-83. As a train master he supervises day to day operations in his district, "manpower, efficiency checks, dealing with customers . . . day to day operations." TR 183. He is the front-line supervision for 130 to 180 people a day. TR 183.

Mr. Myrick explained that a train master and a road foreman of the engines, such as Mr. Eveland, were essentially at the same level, counterparts who have different responsibilities. TR 209, 219. A road foreman is essentially responsible for "[r]iding with the engineers, updating certifications," and a train master's responsibilities are a little more general, performing "banner checks or rules checks" and also for dealing with customers and day-to-day operations, such as building maintenance. TR 216-17, 219. Mr. Myrick testified that there is no coordination between a road foreman of engines and a train master regarding a WERIS report. TR 210. Rather, the district road foreman of engines would deal with the division road foreman, who, in this case, would be in Fort Wayne, Indiana. TR 209-10.

Mr. Myrick served as a training coordinator for two years from November 2007 to October 2009, during which he "was responsible for overseeing the new hires, conductor trainees, management trainees, and when they were in their training period, pretty much dictated their training . . . [and] their 60-day probationary period . . . ." TR 184, 186. Conductor training takes 150 days, plus the sixty days as a probationary conductor. TR 185. Mr. Myrick explained that new conductors spend their first three weeks training in McDonough, Georgia, and they are tested in basic railroad rules. TR 186. The conductor trainees then return to the location they were hired for to complete their training. TR 186. Mr. Myrick also gave written exams and performed field evaluations of new employees. TR 185. Prior to 2007, training coordination was simply a part of the local field supervisor's job, and as such Mr. Myrick was in charge of conductor trainees back when he worked in Tennessee. TR 187.

Mr. Myrick recalled that there is a list of tasks on which conductors are trained, and that judging speeds is a subset of these tasks. TR 187.

> [J]udging the speed can be from shoving to a coupling, and could be using a radar gun on the main line to make sure, and it could be you and I having a conversation back and forth, you know, about what speed you think we're doing, . . . they've got to be familiar with the speed restrictions, if they're in the time table and the special rules and instructions. So that's kind of where that speeds is coming from.

TR 187. However, Mr. Myrick could not say if this was the type of conductor training that took place at the time that Mr. Kruse was being trained, though he did remember the form dating back

as early as 2003. TR 188-89. He added that conductors now "need to know . . . the difference, you know, between 60 and 50, you know, 10 and 20 . . . . And that way if there is any question, they can bring it up to the locomotive engineer, you know, are we speeding, what's your speed. So yeah, that's a pretty, pretty big deal, yes." TR 189.

2. *Return to Work Process*

Norfolk Southern rules require that after an extended absence from work, an employee goes through eleven steps before returning to work; these steps are set forth on a form that was introduced as NS Ex. 1. TR 192; *see also* NS Ex. 1. The Complainant's form shows that he attended a return to work meeting with Mr. Arnovitz and Mr. Myrick, a one-on-one conference with just Mr. Myrick, a review of operations bulletins and notices since the last day of work, and a first safety contact and a rules check which were performed by Mr. Myrick on the Complainant's first trip back at work.[18] NS Ex. 1; TR 190-93. Mr. Myrick explained that all of these procedures are to make sure there is nothing that the employee had forgotten during his time off. TR 192. "Sometimes people may forget rules, get a little bit lackadaisical. . . . [It is] basically just to observe how they work and make sure they're going to work within the rules, and if there's been any rules changes, at that point we can have a discussion . . . ." TR 192-93.

Mr. Myrick testified that he was present for the entire return to work meeting with the Complainant and Mr. Arnovitz. TR 189. Mr. Myrick also performed the one-to-one conference prior to the Complainant's return to work and the first safety contact and rules checks that were required during the Complainant's first trip back at work. TR 190. At the return to work meeting with Mr. Arnovitz and the Complainant, Mr. Myrick remembered a variety of things being discussed: "we talked about communication, talked about any rules changes, had a one to one return to work conference, talked about overexertion, you know, talked about why he was off of work, returning to work, if he needed anymore review trips, where he was going to go to work." TR 190-91.

He remembered Mr. Arnovitz talking to the Complainant about his "return to work and overexertion." TR 191. Mr. Myrick maintained the conversation regarding overexertion was "just something we discuss," and it was not related to the Complainant's injury on March 31st. TR 191. According to Mr. Myrick, Mr. Arnovitz did not tell the Complainant that he could not afford to have any more injuries, and he did not remember Mr. Arnovitz saying anything about the Complainant being watched. TR 191. According to the form filled out during the eleven step process, there was a period of time during which Mr. Arnovitz and Mr. Kruse were alone together, but Mr. Myrick testified that just because an item on the checklist did not have his initials next to it, did not mean that he was not there. TR 204, 207. He believed that he was present for the entire meeting as he "drove to Detroit that day specifically for this reason." TR 207.

[18] The rules check is dated the same as the first safety check, but Mr. Myrick did not initial the rules check separately. NS Ex. 1. He testified that he did perform the rules check at that time, though. TR 204.

3. *Division-Wide Safety Blitz/Increased Supervision*

Mr. Myrick testified that, at the time the Complainant returned to work, there was a division wide increase in supervision. TR 193-94. "We had had the, when I say we, the Lake Division, that division that I work for had had a rash of incidents and equipment damage, things of that nature, like a high number." TR 194. Due to this rash of incidents, a representative from each district in the division had to participate in a 6:00 p.m. conference call "to discuss any incidents that had occurred within the previous 24 hours, and we had to contact or discuss how we were going to contact each crew that was coming on duty. And this went on for a period of about three to four weeks." TR 194. If Mr. Myrick was unable to have face-to-face contact with a crew, he would call them. TR 194. He remembered calling the L61 crew when they came on duty at 6:30 p.m. TR 194. He said he would tell whoever picked up the phone to put him on speaker so that the whole crew could hear. TR 194-95. Mr. Myrick testified that he would always contact both crew members when he called, and that he generally told the same thing to all of the crews under his supervision. TR 196. He would review whatever incidents had happened within the Lake Division during the previous day. TR 195. He testified that he had a record of some of these safety contacts, and that he had reviewed them prior to testifying at hearing, but that he did not have a copy of these records at the hearing. TR 203.

He testified that sometimes another supervisor would make contact: "I know Detroit went down a couple times and had a face to face interaction and maybe they would send a supervisor down to Milan since it was so close." TR 195. He said that this type of supervisory contact was occurring across the entire division. TR 196. Mr. Myrick claimed that it was completely unrelated to Mr. Kruse's work accident in March. TR 196. He testified that there were records of the rules checks and safety contacts on his computer, but he did not have them with him at the hearing. TR 205. He testified that his assistant train master, Chris Pulliam, and Dean Greco from Detroit would have been two people checking in on the Milan yard during this period. TR 205. These rules checks are, many times, done secretly, by driving up alongside the yard or the track and watching from a distance. TR 205-06. He testified that when a supervisor is performing a secret rules check, they would be in an NS provided vehicle, his is "a Durango. Mr. Arnovitz has got an Explorer. People in Peru, Indiana have got Ford Escapes." TR 213-14.

This practice of daily contact continued until one day "[w]e finally quit, the rash of incidents ceased, you know, it calmed down, so then it, once that calmed down then we stopped having the 6 p.m. calls." TR 196. The safety blitz and increased supervision lasted for three to four weeks, "right around the end of August, start of September." TR 197. Mr. Myrick admitted he did not have any written documentation of this safety blitz or increased monitoring. TR 198. He thought that there "was an e-mail that came out, but I couldn't find and produce it." TR 198.

4. *WERIS Alerts*

Mr. Myrick testified that "WERIS alert[s] go[] to the road foreman in engines." TR 199. He was not aware that a WERIS alert had been triggered on September 3rd until after Mr. Lawson had received a phone call about it, and even then he did not know what it was about. TR 199. Engineers are under Mr. Myrick's jurisdiction, but he said that "the WERIS alert goes to the road foreman for engines, not the train master," and that he does not see the WERIS alert.

TR 200. He said that he was called first by the road foreman of engines trainee, who told him that there was a WERIS alert on Engineer Lawson, and then Mr. Lawson also called him. TR 201. Mr. Myrick testified that the road foreman trainee only called because he wanted to know where Mr. Lawson worked; the trainee did not have a contact number for Mr. Lawson. TR 201. "[H]e just asked me about Mr. Lawson, what kind of guy he was, you know, contact information kind of thing, when he could get in touch with him, what job he worked. And he said he had a [WERIS] alert on him and told me what it was and said he was going to talk to him about it." TR 210. Mr. Myrick was told the WERIS alert was about misuse of the independent brake and he was told nothing about speeding. TR 210. Mr. Lawson then called Mr. Myrick "kind of upset" because a strange road foreman had called him. TR 211.

Mr. Myrick testified that he was not involved with the investigation surrounding the WERIS alert, but he agreed that he would have had an interest in the safe operation of the L61 job and would have wanted to know if they had been speeding. TR 202. He had no response to why he was not made aware of the speeding, given the alleged division wide daily calls about safety and rules violations. TR 202. He acknowledged that he has responsibility for training engineers and conductors, and that he would "handle any . . . deficiencies or needing some kind of training," but reiterated that he has nothing to do with WERIS reports. TR 211-12. He explained that the WERIS system is new, but was unable to offer any further information regarding it. TR 212-13.

E. Testimony of David Arnovitz

1. *Background & NS Rules*

Mr. Arnovitz has been employed by NS and its predecessors for thirty six years. TR 220. He started as a brakeman and worked as a conductor, engineer and trainmaster before he became a superintendent. TR 220. He is now the terminal superintended for Detroit, which is within the Lake Division. TR 220-21. Mr. Arnovitz said that his job "takes 24/7 to do," and he is "responsible for the safety of all of [NS] employees and the communities that [NS] trains work and pass through. [He is] also responsible for ensuring that the cars of our customers get delivered right day, right time, right spot at the right cost." TR 220.

Norfolk Southern rules require an employee to report an injury as soon as it occurs. TR 226. "Once that's done he has another decision to make, whether or not he requires medical treatment . . . . If he requests medical treatment we immediately take him to the closest facility . . . . At no time do we encourage our employees not to report." TR 226. In fact, Mr. Arnovitz testified that an employee can be charged with a rules violation for failing to report an injury. TR 226.

Norfolk Southern rules also prohibit retaliating against an employee for reporting an injury. TR 227; NS Ex. 5. Mr. Arnovitz also testified that if a supervisor did retaliate against an employee for reporting an injury, he would most likely be dismissed. TR 227. For the last two years, Mr. Arnovitz has also been responsible for training on issues of "whistle-blowing, retaliation and those kinds of things; how it is not tolerated . . . ." TR 229. He provided this training to approximately 200 employees, "every single employee that reports to me in addition

to other surrounding territories . . . ." TR 230. There are also a couple of different hotlines than an employee can call if they feel that they are being retaliated against. TR 231.

Mr. Arnovitz testified that his job includes compiling all of the disciplinary actions that were taken for the previous month and submitting them to the division headquarters. TR 243. Every district submits a similar report, and the division headquarters puts all of the lists together and submits them to the general manager's office. TR 243. He testified that NS maintains disciplinary records as a matter of course, TR 244, and that NS retains a complete career record of every worker's disciplinary and injury history, which is called a "career service record," TR 245. Mr. Arnovitz described a career service record as a simple document that shows an employee's social security number, name and craft; whether they are an engineer or a conductor. TR 245. It also includes their promotion history dating back to their first being hired, "then there's a record of his discipline . . . . And then there's another final subtitle with any injuries that he may have, whether they are FRA reportable or not." TR 246.

2. *Complainant's Return from Injury & Supervision*

Mr. Arnovitz was not the Complainant's supervisor in August and September of 2010, but he met with the Complainant on his return to work because he was the senior officer in the area and it was not certain as to where Mr. Kruse was going to be assigned on his return to work. TR 221. He recalled explaining changes that had occurred and some "bad outcomes" that had happened while the Complainant was gone. TR 222-23. He added that NS does "safety blitzes from time to time and I wanted to make sure that [the Complainant] was up on that and he read all the superintendent notices and operation bulletins." TR 223. Mr. Arnovitz also discussed the Complainant's injury with him because it "was in a category called over-exertion. And so [they] talked about how if [the Complainant], in the future, encounters difficulty operating equipment that he simply take it out of service and walk away from it . . . ." TR 223. Mr. Arnovitz recalled this conversation as lasting forty-five minutes. TR 223. Mr. Arnovitz testified: "Steve Myrick participated in some of it. I don't think he was there exclusively for all of it. My recollection is that he joined us at some point." TR 223.

Mr. Arnovitz testified that he told the Complainant that he would be watched, but it was within the context of the initial return to work observation and the fact that, "like every other employee [] we observe from time to time, for rules compliance, as we're required to do by the Federal Railroad Administration . . . ." TR 224. Other than these instances of typical supervision, Mr. Arnovitz testified that he absolutely had not told the Complainant that he would be watched. TR 225. He further testified that he did not tell Mr. Kruse that he could not afford another injury or that injuries were not tolerated. TR 225.

Mr. Arnovitz testified that in 2010, the Lake Division had a difficult year in terms of safety, and so Dave Tally, the superintendent of the Lake Division "put out a directive that he wanted all the officers to contact all of the crews for several weeks during [August and September 2010] to make sure that we talked to the crews about safety . . . ." TR 233. Mr. Arnovitz testified that this directive had nothing to do with the Complainant, but rather that it stemmed from "a collection of bad outcomes that were occurring." TR 233-34. He explained that the Lake Division covers parts of Michigan, Ohio and Indiana, "with 1,500 train and engine

employees and one bad outcome or two from an individual or a crew would not have triggered this massive effort to contact every crew member every single time they came to work for a two or three week period." TR 234. Mr. Arnovitz said that there was an e-mail that accompanied this directive. TR 280. The e-mail regarded "contacting all crews as they came to work, every single day for a period of time." TR 280. However, he did not have a copy of the e-mail. TR 280.

3. *Disciplinary Proceedings*

Mr. Arnovitz explained that when an incident requires formal discipline, the "employee is given the option of START handling, which stands for System, Teamwork and Responsibility Training, which is completely outside the collective bargaining agreement. . . . Or they can have a formal investigation by an impartial company official who has [been] trained to hold these kinds of impartial hearings." TR 234. Mr. Arnovitz also said that there is no pressure on the employee as to which avenue they choose, but the START program is "win/win" because it involves sitting down with an "employee who has already accepted responsibility for his actions" and educating them to prevent future problems. TR 242. "We try and make them better and that START process allows us to do that." TR 242. Whereas in a formal investigation under the collective bargaining agreement, Mr. Arnovitz testified that he does not get the same opportunity to talk about the problem. TR 242. The categories of discipline can be the same whether the employee goes through the START process or an investigation under the collective bargaining agreement. TR 288.

Mr. Arnovitz testified that NS's practice is to charge a crew only once for multiple infractions of a rule, TR 262-63, however he did not know if this was a written policy, TR 266. Furthermore, "[i]n most cases the engineer and conductor get the same discipline . . . ." TR 236. An employee is only charged for multiple violations of the same rule if the employee had been counseled between violations. TR 264. He said that this would be the case whether the counseling occurred as part of a disciplinary charge or in response to a WERIS alert. TR 264-65. Mr. Arnovitz has never seen a case where a person was charged only once when multiple infractions occurred over several days, as opposed to multiple infractions on a single day. TR 266. Mr. Arnovitz agreed that excessive speeding is a major offense under the START policies, and that major offenses warrant removal from service pending a formal hearing and can result in dismissal for a single occurrence. TR 266-67.

Mr. Arnovitz testified that conductors can be disciplined for speeding when they are not in the engine, though "[t]hey would have to be in a position to be able to determine if the train is going faster than its maximum authorized speed." TR 261. Therefore, a conductor would not be disciplined "if he was in the yard office . . . or getting something to drink or going to the restroom," but if the conductor is "riding the point of the train or he's standing alongside of it, we could hold him accountable because he has the physical knowledge and can see the train is probably going faster than it should." TR 261. However, Mr. Arnovitz was unaware of any instances were a conductor was charged for speeding when he was not in the engine. TR 262. Instead, he related an incident where a conductor was at the rear of a train during a shoving movement and the "speed led to them going by a stop signal." TR 262. Mr. Arnovitz explained that the conductor was not charged for speeding because "[w]e charged them for going past a

stop signal, which is a more serious offense. But it was the excessive speed that led to the incident occurring." TR 262.

According to Mr. Arnovitz there are several reasons why one member of a crew might receive more severe discipline than another. An engineer might receive a greater punishment than a conductor if the engineer already had a deferred suspension, those deferred days can be activated as part of the immediate charge. TR 256. Another possible reason penalties would differ is if the conductor did not have a speedometer, or in a hypothetical scenario where the conductor asked the engineer how fast they were going or said it seemed as though they were going fast, and the engineer lied, saying that they were going the speed limit. TR 258. Under those circumstances, because the conductor took some action and the engineer lied, NS would not assess the same penalty.[19] TR 258-59; *see also* NS Ex. 15.

Mr. Arnovitz was the "impartial company official" assigned to the collective bargaining agreement process in which Complainant challenged his discipline and Mr. Arnovitz was assigned to the Complainant's case because he "wasn't involved in the investigation and really had no vested interest in the outcome one way or the other." TR 234. Mr. Arnovitz first explained that at the disciplinary hearing "there [were] some problems with some of the evidence. There was a speed tape involved and the numbers for the pages were missing on the copies that were distributed to the local chairman and to the charged employee." TR 235. He also mentioned that there were several breaks in the investigation, but testified: "I was mostly struck by Mr. Kruse's admission that as they were traveling down this running track [] he deferred rules compliance solely to the engineer because he trusted Mr. Lawson. . . . He was riding on the train not doing oversight and not doing his job at his own admission." TR 235.

Mr. Arnovitz was also responsible for assessing the Complainant's discipline, though he testified that he determined the proper level of discipline "with the help of our labor relations department to make sure that our discipline is consistent as it possibly can be . . . ." TR 237. He chose to assess a thirty day actual suspension because Mr. Kruse was on the engine, "and he had neglected to perform his duties as outlined in the rules . . . ." TR 236. Mr. Arnovitz testified that, with the help of the labor relations department, "we determined that this kind of case almost always, not in every case, but most cases without extenuating circumstances is 30 days actual."[20] TR 236-37.

4. *NS Ex. 15, Creation and Content*

Before the hearing in this case, Mr. Arnovitz reviewed twenty-two monthly disciplinary reports aggregated from the entire Lake Division, representing the twelve months of 2010 and

[19]Although Mr. Arnovitz added that this last example of an engineer lying is based upon actual events he had read in career service records, I note that this type of evidence does not appear to be included in career service records. NS Ex 15. Moreover, to the extent Arnovitz relies on career service records for the lying scenario, his statements are not based upon personal first-hand knowledge and are not persuasive. TR 258-60.

[20] He repeated later that a thirty day suspension is "consistent with many of our speeding cases. There are exceptions because of extenuating circumstances. . . . And when there's extenuating circumstances that could either increase or decrease the discipline either from the engineer or conductor. But most of the time it's a standard 30 days actual for most speeding cases." TR 241.

the ten months of 2011 that had already been compiled. TR 244. In the twenty-two monthly reports, Mr. Arnovitz found twenty-nine different speeding cases. TR 244. These twenty-nine speeding cases are listed on the first two pages of NS Ex. 15. Mr. Arnovitz reviewed this list.[21] TR 253-54; NS Ex. 15. The remaining pages of the exhibit are the career service records of the individuals charged with the infractions compiled in the list on the first two pages of NS Ex. 15. NS Ex. 15; TR 252-53. Mr. Kruse and Mr. Lawson's careers service records, however, are at NS Ex. 3 and NS Ex. 8 respectively.[22]

Mr. Arnovitz testified that most of the speeding cases imposed a thirty day actual suspension, which is what he anticipated because labor relations "said this is what we normally do." TR 253-54. Mr. Arnovitz paid particular attention to cases in which the conductor and engineer were disciplined differently. TR 254. He said that those instances were the exceptions, and that he contacted the charging officers to ask why the engineer received more discipline. TR 254.

Mr. Arnovitz was cross-examined on the contents of NS Ex. 15 and acknowledged that the "Extent of Speeding" column inaccurately reflected the Complainant and Mr. Lawson as going eight miles an hour over the speed limit, as opposed to six miles per hour. TR 267-68. However, he contested the characterization of the exhibit as wrong, because the information that was inaccurate did not actually appear in the employee's discipline record. TR 267-68. Nor did this information come from the investigation findings or transcript. TR 268-69. Rather, as it was "an extra piece of information that NS counsel had asked for," it was apparently drawn from the division road foreman's notes. TR 268-69. Mr. Arnovitz explained that three people worked on compiling the first two pages of NS Ex. 15, and because "there was an attempt to supply this information over a short period of time [] they looked at different sources" because the information was not contained on the employee's career service records. TR 270. The specific number of eight miles per hour over the speed limit, referred to the WERIS alert from September 3rd, and came from the notes of Joey Hall, the road foreman of the division. TR 268-69. Mr. Arnovitz testified that he had not seen these notes during the creation of NS Ex. 15. TR 269. He had seen them following the investigation, but he could not remember why they had come across his desk back then. TR 269-70. Mr. Arnovitz did not know who had been working with Mr. Lawson on the 3rd of September. TR 270.

---

[21] Mr. Arnovitz's testimony whether he was actually involved in the creation of NS Ex. 15, or if he simply reviewed the list after its creation is confusing. At first, he testified that he actually reviewed twenty-two monthly reports, identified twenty-nine speeding cases, and that he was "particularly curious about the [cases] that had different discipline" for the engineer than for the conductor. TR 254. He also testified that he "contacted the charging officers in those cases to ask [] why the engineer would have received more discipline than the conductor." TR 254. However, he later testified that because "there was an attempt to supply this information over a short period of time," TR 270, the first two pages of NS Ex. 15 were created by "three people that worked to compile this information, which I then later checked." TR 269. In this later instance, he says that "**they** looked at different sources to try and find" the information for the list, TR 270 (emphasis added), which implies that he was not one of the individuals involved in actually compiling the list, which makes up the first two pages of NS Ex. 15. I conclude that he did not personally create NS Ex 15, but rather supervised others who created the document based upon information from other sources.

[22] NS Ex 8 was admitted at the hearing, but is not reflected as having been admitted in the transcript of the hearing. *See* TR 169-71.

Mr. Arnovitz acknowledged that many of the speeding charges reflected in NS Ex. 15 involved "road jobs," and that some engines have speedometers in front of the conductors, but because he had not actually read the transcripts of these cases, he could not say whether any particular conductor in any particular instance listed on NS Ex. 15 had a speedometer. TR 270-71. He did remember that "in at least one or two of the cases" that he reviewed, the engine had a speedometer on the conductor's side, and the train being pulled included a car with speed restriction below the actual speed limit of the track. TR 272.

Three of the cases listed on NS Ex. 15 involved a local train, similar to the job the Complainant works. TR 273. In those cases, only the engineers were charged for speeding. TR 273. The engineers were: Mr. Wilken, Mr. Adkins and Mr. Gardner. TR 273; NS Ex. 15 at 17-21. Mr. Arnovitz said that he had done research specifically on these cases and made notes, but that he did not have his notes at the hearing. TR 275. Mr. Arnovitz testified that the cases of Mr. Adkins and Mr. Gardner involved the same locomotive, and that that engine did not have a speedometer on the conductor's side. TR 276. The conductors in these cases were not charged, even though the conductors were in the engine with the engineer. TR 277. All he knew about Mr. Wilken's case was that the conductor was not charged, TR 275, but he believed that the conductor had been in the engine there, also. TR 279. He confirmed that in all of these cases, the conductors were not charged with so much as a minor offense. TR 279.

V. Findings of Fact and Conclusions of Law

A. Whistleblower Protection under the FRSA

Section 20109(a)(4) of the FRSA prohibits railroad carriers from discharging, demoting, suspending, reprimanding or in any other way discriminating against an employee if such discrimination is due to the employee's "notify[ing], or attempt[ing] to notify, the railroad carrier . . . of a work-related personal injury or work-related illness of an employee." 49 U.S.C. § 20109(a)(4). Section 20109(c)(2) prohibits a railroad carrier from disciplining or threatening to discipline an employee for requesting medical or first aid treatment, or for following the orders or treatment plan of a treating physician. The whistleblower protection provisions of the FRSA were enhanced in 2007, in part because of a perceived history of intimidation and retaliation against railroad workers injured on the job. Conference Report H.R. Rep. 110-259, at 348 (July 25, 2007). The FRSA whistleblower provision incorporates the administrative procedures found in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121. *See* § 20109(d)(2)(A)(i); H.R. Rep. 110-259, at 358. Therefore, complaints under the FRSA are analyzed under the legal burdens of proof outlined in the AIR 21.

The burden-shifting framework set forth in AIR 21 requires a complainant to prove by a preponderance of the evidence[23] that: "(1) he engaged in a protected activity, as statutorily

[23] The "[p]reponderance of the evidence is the greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." *Brune v. Horizon Air Indus.*, ARB No. 04-037, ALJ No. 2002-AIR-8 PDF at 13 (ARB Jan. 31, 2006) (internal quotation marks omitted) (*quoting Black's Law Dictionary* at 1201 (7th ed. 1999)).

defined; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the unfavorable personnel action." *DeFrancesco v. Union Railroad Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, PDF at 5 (ARB Feb. 29, 2012) (*citing* 49 U.S.C.A. § 42121(b)(2)(B)(iii); *Luder v. Continental Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-009, slip op. at 6-7 (ARB Jan. 31, 2012)). A "contributing factor" is one that "alone or in connection with other factors, tends to affect in any way the outcome of the decision." *DeFrancesco,* ARB No. 10-114, PDF at 6 (*quoting Williams v. Domino's Pizza*, ARB 09-092, ALJ 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011)); *see also* OSHA, Interim Final Rule, *Procedures for the Handling of Retaliation Complaints Under the National Transit Systems Security Act and the Federal Railroad Safety Act*, 75 Fed. Reg. 53522, 53524 (Aug. 31, 2010) (*citing Marana v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)).

If a complainant proves that his protected activity contributed to the adverse action, the employer may avoid liability if it "demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of [the protected activity]." 49 U.S.C. §§ 42121(b)(2)(B)(iv), 20109(d)(2)(A)(i); *see also* 29 C.F.R. § 1982.104. If the employer does so, no relief may be awarded to the complainant. § 42121(b)(2)(B)(iv). "Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'" *Williams,* ARB 09-092, PDF at 5 (*quoting Brune,* ARB No. 04-037, slip op. at 14).

The parties have stipulated that the Complainant engaged in protected activity when he was injured and notified NS of his injury on March 31, 2010, and that NS took adverse action against him when he was charged and disciplined for excessive speeding. *See* TR 6-7. Therefore, the only issues are whether the Complainant's protected activity was a contributing factor in NS's decision to charge and discipline him, and if so, whether NS has shown by clear and convincing evidence that it would have done so regardless of the Complainant's protected activity.

B. Contributing Factor

In establishing the contributing factor, a complainant need not "prove that his protected activity was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action" but only that his protected activity "tends to affect in any way the outcome of the [employer's] decision." *Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, PDF at 13 (ARB Sept. 30, 2011) (internal quotations and citations omitted). A complainant can connect his protected activity to the adverse action directly or indirectly through circumstantial evidence. *Williams,* ARB 09-092, PDF at 6; *DeFrancesco*, ARB No. 10-114, PDF at 6-7.

Direct evidence "conclusively links the protected activity and the adverse action and does not rely upon inference." *Williams*, ARB 09-092, PDF at 6 (*citing Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-028, PDF at 4-5 (ARB Jan. 30, 2008)); *DeFrancesco*, ARB No. 10-114, PDF at 6 (holding employer's suspension of employee who reported job-related injury "violated the direct language of the FRSA"). A complainant may also rely upon circumstantial evidence, which

> 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 for the adverse action taken, and a change in the employer's attitude toward a complainant after he or she engages in protected activity.

DeFrancesco, ARB No. 10-114, PDF at 7; *see also Bechtel*, ARB No. 09-052, PDF at 13, n.69; *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, PDF at 13 (ARB June 24, 2011). Circumstantial evidence must be weighed "as a whole to properly gauge the context of the adverse action in question." *Bobreski*, ARB No. 09-057, PDF at 13-14. This is because "a number of observations each of which supports a proposition only weakly can, when taken as a whole, provide strong support if all point in the same direction." *Bechtel*, ARB No. 09-057, PDF at 13 (*quoting Sylvester v. SOS Children's Vills. Ill., Inc.*, 453 F.3d 900, 903 (7th Cir. 2006)).

The Complainant's position is that the temporal proximity between the Complainant's return to work and his being charged for speeding provides an inference of retaliation. (Compl. Br. 17-18.) Complainant contends that he was targeted upon his return to work following his injury. (Compl. Br. 16-21). Complainant further argues that NS has failed to provide a credible and consistent explanation for its decision to disciplined Complainant for excessive speeding on September 7, 2010. (Compl. Br. 17-22.) The Respondent contends that the Complainant failed to establish that his protected activity was a contributing factor in his discipline for speeding and maintains that it "has never waivered [sic] from its explanation that the sole reason for Mr. Kruse's discipline was his speeding on September 7, 2010 . . . ." (Resp. Br. 14-16.)

1. *Temporal Proximity*

A common source of circumstantial evidence in retaliation cases is the "temporal proximity between the protected activity and the adverse action." *Warren v. Custom Organic*, ARB No. 10-092, ALJ No. 2009-STA-030, PDF at 11 (ARB February 29, 2012) (*citing Reiss v. Nucor Corp.*, ARB No. 08-137, ALJ No. 2008-STA-011 (ARB Nov. 30, 2010)). The closer in time between the protected activity and the adverse action, the stronger the inference created. *Id.* Of course, if temporal proximity were the only factor weighing in favor of finding contribution, it would necessarily fail "in the face of compelling evidence to the contrary." *Spelson v. United Express Systems*, ARB No. 09-063, ALJ No. 2008-STA-039, PDF at 3 n.3.

The Respondent argues that more than five and a half months had passed between injury and discipline, belying any temporal proximity. (Resp. Br. 21-22.) The Complainant maintains that the adverse action occurred barely a month after the Complainant's return to work from the

injury. (Compl. Br. 17-18.) In light of the Complainant's absence from the workforce while he recovered from his work related injury, and his return on August 11th, followed by his suspension a month later, I find that the closeness in time between his return to work from injury and his suspension supports an inference of retaliation.

2. *Targeting Complainant*

The record includes additional circumstantial evidence supporting an inference that Complainant was targeted as a result of the work injury. The Complainant testified that he met with Mr. Arnovitz alone[24] during the return to work meeting held on or about August 9th and was told that he could "ill afford to have another" injury, TR 22, that injuries were "not tolerated" and that he would be watched, TR 56. Mr. Myrick testified that he was present for the entire meeting between the Complainant and Mr. Arnovitz, and that nothing so explicit was said. TR 189-91. Despite Mr. Myrick's recollection that he was present for the entirety of this return to work meeting, Mr. Arnovitz corroborated Complainant's testimony stating that he and the Complainant were alone for a portion of the meeting and Mr. Myrick joined them at some point. TR 223.

Mr. Arnovitz testified that he told the Complainant that upon his return to work there would be a safety check the day he returned and then shortly thereafter rule checks to be sure he was in compliance with rules, and thereafter he would be "like every other employee we observe from time to time, for rules compliance." TR 224. The Complainant testified that Mr. Arnovitz reviewed his injury history with the railroad noting he had had three injuries and told him he was "going to be watched" upon his return to work. TR 22. Mr. Kruse said he left the meeting feeling he had a target on his back. TR 22. The Complainant was subjected to an increase in supervision well above and beyond anything he had ever previously experienced, including nearly daily in-person contact for ten days to two weeks, and daily telephone contact for almost a month. His testimony that he was the subject of increased scrutiny was corroborated by Mr. Lawson the engineer and by Respondents' witnesses Mr. Arnovitz and Mr. Myrick.

At the hearing and for the first time, Mr. Arnovitz and Mr. Myrick explained the extraordinary frequency of checks and monitoring of Complainant upon his return following the injury, as part of a division-wide "safety blitz" allegedly in response to a series of incidents in the district. In light of Mr. Arnovitz's statement to Complainant at the return to work meeting that he would be subject to a safety check the day he returned and then normal rule checks thereafter, I find Mr. Arnovitz's and Mr. Myrick's hearing testimony which is the first time NS attributes the increased monitoring of the Complainant to a division-wide safety blitz is unworthy of credence. This explanation is further undermined by the absence of any documentation in the form of directives, memos, letters or e-mails to supervisors announcing the safety blitz. Nor was the Complainant or Mr. Lawson informed of the existence of any safety blitz. I find that the

[24] The Complainant had used the word "they," when describing his meeting with Mr. Arnovitz. He later clarified that he was referring to "Norfolk Southern as a whole conglomerate. They are Norfolk Southern, I am me." TR 54. The Respondent's brief notes this usage as indicative of there being multiple people present at this meeting (Resp. Br. 2-3 n.1), yet Respondent's own witnesses used plural language when singularly speaking on behalf of NS. *See e.g.* TR 262 (testimony of David Arnovitz).

Complainant's reported injury was a factor in the Respondent's daily monitoring of his work upon his return following the injury.

More overtly damning is Mr. Eveland's testimony that he wanted to "nail" Mr. Kruse for speeding, and that was the reason he brought charges only for the speeding incident on September 7th. Apparently realizing that his expressed desire to "nail" the Complainant was problematic for NS's defense, Mr. Eveland tried to explain away this language, saying that this instance presented the easiest factual case to prove, and that his focus was on the crew. He stated that he chose that incident as it was the one speeding incident in which he was certain that Complainant was on the engine with the engineer, Mr. Lawson.[25] *See* TR 128. However, his testimony makes clear that his focus was always on ensuring that Mr. Kruse was charged, making the rules violations of Mr. Lawson who was operating the engine almost a collateral issue, because he could have charged Mr. Lawson for several speeding incidents the week of September 7th as the engineer was always operating the locomotive. In this case, the only "crew" other than Mr. Lawson is the Complainant, and all of the speeding violations against Mr. Lawson were easily proven as he was always responsible for the speed of the train, as the engineer.

Mr. Eveland charged Complainant with speeding at twenty-one miles per hour, six miles per hour over the maximum speed of fifteen miles per hour, for a period of six seconds in the only instance he was sure Complainant was riding in the engine with Mr. Lawson. Mr. Eveland asserted that he expected the Complainant to know the difference between a speed of fifteen and twenty-one miles per hour on the train simply by experience even though the Complainant did not have a speedometer on his side of the engine or any mile-markers on his side of the train to assist in judging the train speed. This assertion is not supported by other witnesses,[26] is patently unreasonable and is simply not worthy of credence.

Mr. Eveland's desire to "nail" the Complainant for speeding and his attempt to support that charge by asserting Complainant should have been able to determine the train was speeding without access to any of the tools normally used to judge the speed of a train, is persuasive evidence that Respondent targeted the Complainant, at least in part, as a result of his having sustained a work injury and reported it.

[25] In fact, Mr. Eveland's testimony failed to support even this explanation, as he contradicted himself by first saying Complainant could only be charged if he was on the engine, TR 118, but later testifying under questioning by NS counsel that Complainant could have been charged for any of the speeding incidents, TR 156. The only consistent explanation provided by Mr. Eveland was that he wanted to ensure Mr. Kruse was charged.

[26] Although Mr. Myrick testified that conductors were now trained on estimating the speed of a train, he did not know whether this was part of the training when Complainant was trained. TR 187-89. Moreover, Mr. Myrick testified that conductor training only sought to have conductors be accurate to within ten miles per hour. TR 189. The Complainant testified that he was never trained or tested on his ability to gauge the speed of a train, TR 40, and Mr. Lawson added that a conductor's sense of train speed is hindered by not having constant access to a speedometer by which the conductor can develop the ability, TR 90.

3. *Inconsistent Explanations for Discipline*

Respondent has also offered inconsistent explanations for the discipline assessed Complainant. Mr. Eveland charged the Complainant with excessive speeding on the Milan track. JX 10. At the hearing he contended that the Complainant also violated operating rule Rule 582 which says "conductors have charge of trains to which they are assigned . . . ." TR 164. Rule 582 states "the conductor is directly responsible for the safe and efficient movement of the train." NS Ex. 6 at 4; TR 160, 164. Mr. Arnovitz, the official reviewing the charge and assessing discipline, stated that a significant reason for his imposition of discipline to Mr. Kruse was that Complainant failed to comply with the rule requiring conductors to be in charge of the train and Complainant deferred rules compliance to the engineer. TR 235. However, Respondent did not charge the Complainant with violating Rule 582 or deferring rules compliance, rather, it charged him with excessive speeding. NS's reliance on other company rules that it did not charge Complainant with violating to supports its suspension of Complainant is additional circumstantial evidence that NS was focused on making sure Complainant was disciplined. The shifting explanations Respondent offers to support its suspension of Complainant without pay support an inference that Complainant's reporting of his injury contributed to his suspension.

Taken together the close temporal proximity between the protected activity and the adverse action coupled with the heightened scrutiny of Complainant's work activities upon his return, Mr. Eveland's desire to "nail" the Complainant, and the inconsistent explanations for the discipline is persuasive evidence that Complainant's reporting of a work injury was a contributing factor in his suspension. For these reasons, considering the totality of the circumstances under which the Complainant was charged and disciplined, I find that the Complainant has proven by a preponderance of the evidence that his reporting an injury on March 31st, 2010, contributed to his thirty day suspension.

C. Would NS Have Taken the Same Action Absent the Protected Activity

Once Complainant has shown that his protected activity was a contributing factor to the adverse employment action, Respondent is liable unless it can prove by clear and convincing evidence that it would have taken the same action absent the protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv); *Patino v. Birken Manufacturing Co.*, ARB No. 06-125, 2005-AIR-23 (ARB July 7, 2008); *see also* § 20109(d)(2)(a)(i). The clear and convincing standard is a higher burden than a preponderance of the evidence, and the Respondent must conclusively demonstrate "that the thing to be proved is highly probable or reasonably certain." *DeFrancesco*, ARB No. 10-114, PDF at 8 (*citing Clarke v. Navajo Express, Inc.*, ARB No. 09-114, ALJ No. 2009-STA-018, slip op. at 4 (ARB June 29, 2011); *Williams*, ARB 09-092, slip op. at 5).

NS has not established that the discipline assessed against Complainant for excessive speeding was consistent with discipline assessed against other conductors who did not have a conductor-side speedometer. Nor did NS demonstrate that a conductor had been charged with speeding when he did not have access to a speedometer. Respondent concedes that "[t]he most that can be gleaned from the record [NS Ex. 15 and testimony of Mr. Arnovitz] is that three conductors, who did not have conductor side-speedometers, were not disciplined for speeding incidents in which their engineers were charged – no more, no less." (Resp. Reply at 2, n.2.)

Respondent argues that "the remaining speeding cases addressed on NS Exhibit 15, including the majority of such cases where the conductor and the engineer received exactly the same discipline, the record established at the hearing is wholly silent as to the factual question of whether or not the conductor had a speedometer." (Resp. Reply 2.) However, most, if not all of the remaining speeding cases involved road engines, and the record supports an inference that almost all road engines have speedometers the conductor can see. *See* TR 36-37, 86, 124, 270-71. Therefore, by the Respondent's own admission, they have not established other instances in which a conductor without access to a speedometer, milemarkers or other aids for determining speed, was charged for excessive speeding. Therefore, I find that there is no credible evidence that NS's ordinary practice is to hold conductors equally responsible for an engineer's speeding, where the conductor does not have access to a speedometer.

Additionally, Mr. Eveland and Mr. Arnovitz testified that NS has created a semi-objective internal review process to review charges to make sure that they are well founded. The charge was excessive speeding. As an objective fact-finder, Mr. Arnovitz testified that he looked past serious weaknesses in the company's presentation of the case at the disciplinary hearing because he "was mostly struck by Mr. Kruse's admission that . . . he deferred rules compliance solely to the engineer because he trusted Mr. Lawson." TR 235. As discussed above, it is apparent that Mr. Arnovitz considered violations of rules other than the rule Complainant was charged with violating when he assessed the thirty day suspension against Complainant.

Respondent has failed to establish, by clear and convincing evidence that it would have suspended the Complainant for thirty days without pay absent his injury report on March 31, 2010. It did not point to similarly situated employees treated the same. It did not appear to follow its own procedures for investigating charges as Mr. Arnovitz clearly considered alleged violations of company rules not charged in assessing Complainant a thirty day suspension. NS has offered little evidence that it would have suspended the Complainant in the absence of his protected activity.

VI. REMEDIES

A successful complainant is entitled to be made whole under the FRSA. 49 U.S.C. § 20109(e)(1). The FRSA further provides for "compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees." § 20109(e)(2)(C). Though not explicitly stated in the FRSA, the Board has found that damages for emotional distress are available under language identical to § 20109(e)(2)(C). *See Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047, PDF at 7-8 (ARB Aug. 21, 2011) (interpreting 49 U.S.C. § 31105(b)(3)(A)(iii)); *see also Mercier v. Union Pacific R.R. Co.*, ARB Nos. 09-101, -121, ALJ Nos. 2008-FRS-3, 4, PDF at 8 (ARB Sept. 29, 2011) (noting complainant may seek damages for mental hardship under the Act). Punitive damages up to $250,000 are also authorized. § 20109(e)(2)(C).

As an initial matter, the Complainant is entitled to have his disciplinary record expunged of any reference to the charges of speeding on September 7, 2010, including but not limited to the removal of his START major discipline.

A complainant must prove compensatory damages by a preponderance of the evidence. *Ferguson*, ARB No. 10-075, PDF at 7. In the present case, the Complainant seeks compensatory damages for emotional distress.[27] A complainant's credible testimony alone is sufficient to establish emotional distress. *Id.* at 7-8; *see also Simon v. Sancken Trucking Co.*, ARB Nos. 06-039, -088, ALJ No. 2005-STA-040 (ARB Nov. 30, 2007) (vacating ALJ's award of emotional damages where complainant did not testify to any emotional harm). Here, the Complainant provided compelling and credible testimony that as his family's sole financial provider he suffered emotional distress as a result of being without income for an entire month. He requests $10,000 to rectify this suffering. (Compl. Br. 24-25.)

I find the Complainant's testimony that he experienced emotional distress and worry as to how he would provide for his family's financial needs with the loss of thirty days income persuasive. A brief survey of other whistleblower cases shows that awards for emotional distress tend to range from $4,000 to $10,000, though a couple outliers have awarded compensatory damages including emotional distress of upwards of $75,000.[28] While the suspension and loss of a month's income as the sole breadwinner was distressing to the Complainant, the lost wages were eventually paid and there was no termination in this case. Therefore, I find that $4,000 is an appropriate award for the distress and stress resulting for Complainant's thirty day suspension without pay.

Since I have determined that NS violated the FRSA, the Complainant's counsel is entitled to submit a petition for attorney fees and costs for his work before the Office of Administrative Law Judges within 20 days of receipt of this Decision and Order. Respondent's counsel has 20 days from receipt of the fee petition to file a response.

The Complainant seeks punitive damages as permitted by the FRSA. Punitive damages are to punish unlawful conduct and to deter its repetition. *BMW v. Gore*, 517 U.S. 559, 568 (1996). Relevant factors when determining whether to assess punitive damages and in what amount include: (1) the degree of the defendant's reprehensibility or culpability; (2) the relationship between the penalty and the harm to the victim caused by the respondent's actions;

---

[27] As a result of the disciplinary hearing under the collective bargaining agreement, the Complainant's discipline was reduced from a thirty day suspension without pay to a suspension. He is not claiming lost wages in the instant matter.

[28] *Ferguson*, ARB No. 10-075, PDF at 7-8 ($50,000 in discharge case also awarding punitive damages); *Carter v. Marten Transport, Ltd.*, ARB Nos. 06-101, 06-159, ALJ No. 2005-STA-63, PDF at 15-16 (ARB June 30, 2008) ($10,000 in discharge case); *Hobson v. Combined Transport, Inc.*, ARB Nos. 06-016, 06-053, ALJ No. 2005-STA-35, PDF at 7-8 (ARB Jan. 31, 2008) ($5,000 in discharge case); *Jackson v. Butler & Co.*, ARB Nos. 03-116 and 03-144, ALJ No. 2003-STA-26, PDF at 9 (ARB Aug. 31, 2004) ($4,000 in discharge case); *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071 and 03-095, ALJ No. 2002-STA-35, PDF at 17 (ARB Aug. 6, 2004) ($10,000 in discharge case); *Michaud v. BSP Transport, Inc.*, ARB CASE NO. 97-113, 95-STA-29, HTML at 7-8 (ARB Oct. 9, 1997) (affirming $75,000 of compensatory damages including emotional distress supported by medical evidence in discharge case); *Anderson v. Amtrak*, 2009-FRS-003, PDF at 25 (ALJ Aug. 26, 2010) ($60,000 in discharge case also assessing $100,000 in punitive damages); *Calhoun v. United Parcel Service*, 2002-STA-31, HTML at 39-40 (ALJ June 2, 2004) ($2,000 where ALJ found employer's retaliatory actions were not particularly egregious, nor the emotional damage as extensive as other cases). *See also Burlington Northern v. White*, 548 U.S. 53, 58-59, 72 (2006).

(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). Punitive damages are appropriate for cases involving "reckless or callous disregard for the [complainant's] rights, as well as intentional violations of federal law . . . ." *Smith v. Wade*, 461 U.S. 30, 51 (1983), *quoted in Ferguson*, ARB No. 10-075, PDF at 8-9. The Administrative Review Board further requires that an ALJ weigh whether punitive damages are required to deter further violations of the statute and consider whether the illegal behavior reflected corporate policy. *Ferguson*, ARB No. 10-075, PDF at 8.

Punitive damages have been awarded in cases in which employees were disciplined directly for seeking medical treatment, following physician's orders after a work injury or being charged with a rules violation after seeking medical attention for or reporting a work injury. *Anderson*, ARB No. 2009-FRS-003, PDF at 8-9, 21-22; *Vernace v. Port Authority Trans-Hudson Co.*, ALJ No. 2010-FRS-018, PDF at 29 (Sept. 23, 2011). Although the damage to Mr. Kruse was sufficient to prove his claim, under the circumstances of the present case I do not find the harm was so severe as to warrant punitive damages.

ORDER

For the foregoing reasons, I find that Complainant has established that Respondent retaliated against him in violation of the Federal Rail Safety Act for reporting a work-related injury. It is hereby ORDERED:

1. Respondent will expunge Complainant's personnel file of any disciplinary record or negative references related to the charges and discipline arising from the September 7, 2010 speeding incident.

2. Respondent will pay Complainant compensatory damages in the amount of $4,000 for emotional distress suffered as the result of his suspension without pay.

3. Respondent will pay Complainant's reasonable attorney's fees and costs. The Complainant shall file a fee application within **20 days** of the date on which this order is issued. Should the Respondent object to any fees or costs requested in the application, the parties' attorneys shall discuss and attempt to informally resolve the objections. Any agreement reached between the parties as a result of these discussions shall be filed with the court in the form of a stipulation. In the event that the parties are unable to resolve all issues relating to the requested fees and

costs, the Respondent's objections shall be filed not later than **20 days** following service of the Complainant's fee application. **Any objections must be accompanied by a certification that the objecting party made a good faith effort to resolve the issues with the Complainant's attorney prior to the filing of the objections.**

SO ORDERED.

A

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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

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

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix

(one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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

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

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