

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 07 August 2012

Case No.: 2011-FRS-23

In the Matter of:

Darwin P. Oakes,
Complainant

v.

Central Railroad Company of
Indianapolis, d/b/a Chicago, Fort Wayne,
And Eastern Railroad,
Respondents

DECISION AND ORDER

This matter arises under the employee protection provisions of the Federal Rail Safety Act ("FRSA"), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. Law No. 110-53. This provision prohibits railroad carriers engaged in interstate commerce from discharging or otherwise discriminating against any employee for providing information regarding any conduct that the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security, or reporting in good faith a hazardous safety or security condition. 49 U.S.C. § 20109(a)(1), (b)(1)(A).

PROCEDURAL BACKGROUND

The Complainant, Mr. Darwin Oakes, timely filed a complaint with the Secretary of Labor on July 2, 2009, alleging that the Respondent suspended and terminated his employment in violation of the FRSA. Following an investigation, the United States Department of Labor's Occupational Safety and Health Administration ("OSHA") found reasonable cause to believe that the Respondent had discriminated against Mr. Oakes in violation of the FRSA. Accordingly, in the Secretary's Findings issued on May 27, 2011, OSHA ordered the Respondent to pay Mr. Oakes (1) back wages, plus interest reflecting the amount he would have earned from January 1, 2009 through September 13, 2009; (2) attorney fees; (3) compensatory damages including moving expenses and other expenses; and (4) punitive damages for its "reckless disregard for the law and complete indifference to Complainant's rights under 49 U.S.C. § 20109." OSHA further ordered the Respondent to expunge Mr. Oakes' personnel records and any other adverse references related to his discharge or the exercise of his rights under 49 U.S.C. § 20109; change its records to reflect that Mr. Oakes resigned from his position

with Respondent effective January 13, 2009; and provide a neutral employment reference to all potential employers who inquire about Mr. Oakes.

The Respondent timely appealed OSHA's findings to the Office of Administrative Law Judges ("OALJ"), and the matter was assigned to the undersigned Administrative Law Judge ("ALJ"). A formal hearing took place on March 20 and 21, 2012, in Fort Wayne, Indiana. At that time, I admitted Administrative Law Judge Exhibits (ALJX) 1 and 2; Joint Exhibit (JX) 1; Complainant's Exhibits (CX) 1 through 33, 36 through 57, and 59; and Respondent's Exhibits (RX) 1 through 13.¹ On May 8, 2012, I issued an Order closing the record and providing the parties time to submit written briefs. The Complainant submitted a brief on June 26, 2012; the Respondent submitted a brief on June 21, 2012. The Complainant and Respondent submitted response briefs on July 24, 2012.

Background

The Respondent, Central Railroad Company of Indianapolis, is a short line railroad offering service from Tolleston, Indiana to Crestine, Ohio. The Complainant, Darwin Paul Oakes, began working as a conductor for Respondent in 2007. As a conductor, Mr. Oakes was responsible for delivering, switching, and picking up railcars from Respondent's customers.

On December 23, 2008, following a dispute over whether Mr. Oakes had properly reported his three-day absence, the Respondent charged Mr. Oakes with "job abandonment" and suspended his employment. Shortly thereafter, the Respondent additionally charged Mr. Oakes with insubordination and conduct unbecoming an employee of the railroad for allegedly directing "grossly offensive and vulgar language" at the Respondent's officers after he was informed of his suspension. After a conducting a hearing, the Respondent sustained the job abandonment charge and issued Mr. Oakes a fourteen day suspension. The Respondent sustained the latter charges as well, and removed Mr. Oakes from service, effective January 17, 2009, for insubordination and conduct unbecoming a railroad worker.

In response, Mr. Oakes timely filed a complaint with the Secretary of Labor on July 2, 2009, alleging that the Respondent suspended and terminated his employment in violation of the FRSA. In addition, Mr. Oakes' Union, the Brotherhood of Locomotive Engineers and Trainmen ("BLET"), filed a grievance appealing both instances of the Respondent's discipline—the suspension for job abandonment and termination for insubordination—before the Public Law Board, an arbitration board whose decision is final and binding, in accordance with the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*

On September 27, 2010, upon consideration of the record, Public Law Board No. 7377 issued two separate decisions related to the Respondent's discipline of Mr. Oakes. The first decision, Award No. 3, addressed Mr. Oakes' fourteen day suspension for job abandonment, finding the Respondent's fourteen-day suspension of Mr. Oakes to be excessive and Respondent's withholding of Mr. Oakes from service to be in violation of the collective bargaining agreement. Accordingly, the Respondent was ordered to ensure that Mr. Oakes was

¹ Complainant's Exhibits 60 through 64, and Respondent's Exhibits 14 and 15, were marked and identified for use as impeachment or to refresh recollection; they were not admitted.

“made whole for all time lost in excess of seven days.” The second decision, Award No. 4, addressed Mr. Oakes’ dismissal for insubordination. Even assuming Mr. Oakes was guilty of the charged conduct, the Public Law Board did not believe dismissal was the appropriate measure of discipline, and the Respondent was ordered to reinstate Mr. Oakes with seniority rights unimpaired, but without compensation for time lost.

HEARING TESTIMONY

WITNESSES²

The following witnesses testified at the March 20 and 21, 2012 hearing in this claim.

Darwin Oakes

Mr. Oakes worked for the Chicago South Shore and South Bend Railroad in Michigan City, Indiana, for 25 years, starting as a collector, and was promoted to engineer in June 1983. Mr. Oakes was an engineer for both freight and passenger service, on a corridor from South Bend, Indiana to downtown Chicago on the B&O, CSX and IHB railroad lines (Tr. 38).

In November 2005, Mr. Oakes reported himself for passing a stop board, which protects workers on the main line, by about ten feet (Tr. 40). Mr. Oakes was given a drug test, which was negative. However, a few days into his 30 day suspension for the rule violation, Mr. Oakes was asked to do a random drug test, which was positive for THC. Although Mr. Oakes had not used marijuana on company property, the company had a zero tolerance policy, and he was dismissed (Tr. 40-41). Mr. Oakes was out of work for two years, during which time he sold his house and moved in with his fiancé, and worked odd jobs (Tr. 41-42).

In October 2007 Mr. Oakes was hired by CF&E as a conductor (Tr. 44). Mr. Oakes explained that while it is the engineer’s job to operate the train, he cannot move until the conductor tells him to. During the application process, Mr. Oakes disclosed the previous incident involving his marijuana use; he had gone through rehabilitation, and had the paperwork to prove it (Tr. 43). Mr. Oakes started work on October 29, 2007, and trained on all jobs with other conductors before making his first trip (Tr. 44).

Gregory Wolfersheim

Mr. Wolfersheim was hired at CF&E in July 2004 as an engineer, just as CF&E was starting up. He spent a week to a week and a half in rules classes and training, and his first day of work was on August 1, 2004 (Tr. 237-238). Mr. Wolfersheim worked for six or seven railroads, mostly short lines, before coming to CF&E. He estimated that he had worked for 40 years, off and on, for railroads and railroad related industries. Just before he started at CF&E, Mr. Wolfersheim worked for another RailAmerica railroad, the Toledo, Peoria and Western out of Remington, Indiana. Things had slowed down, and he was working only one day a week. CF&E was a new operation, which was going to be busy, with a lot of work for everyone; it was a good opportunity. Mr. Wolfersheim was hired at CF&E with the understanding that he was

² Cary Moss, the senior trainmaster when Mr. Oakes worked for CF&E, has passed away.

capable of multiple jobs, including conductor, which he occasionally did (238-239).

Mr. Wolfersheim left CF&E in May 2010; he works for the Canadian National Railway in Joliet, Illinois. He relocated 165 miles for this job (Tr. 253). Mr. Wolfersheim stated that he left partly for money, but mostly because he was disappointed at the way CF&E was being operated (Tr. 253). According to Mr. Wolfersheim, there were safety issues that they questioned, but nothing was ever addressed or taken care of (Tr. 254). For example, there were brush conditions on the railroad, with vegetation and trees so close they could hit them in the face when they had to look out and back for a hand signal from the conductor (Tr. 254). Mr. Wolfersheim stated that there were a lot off issues with the locomotives, some mechanical, and some of them safety, such as the brakes not working properly (Tr. 255).

When Mr. Wolfersheim left CF&E, he was number one on the seniority list, which meant that when a job came open for bid, he had first choice (Tr. 258). But Mr. Wolfersheim stated that he was getting really concerned about safety issues that did not seem to be taken care of; he also thought some customers were getting the short end (Tr. 259). At his new job, he is very near the bottom in seniority, and can hold a job only until someone with more seniority wants it (Tr. 260, 269).

Mr. Wolfersheim stated that when he left CF&E, his annual pay was between \$65,000 and \$75,000 a year, depending on overtime. It is now a little closer to \$90,000. However, the cost of living is much higher in Illinois. He thought that working for a larger railroad gave him a little more opportunity for work, because they are busier, and have more money, as well as a strong labor group. But his schedule is worse, because he is on the extra board, with no control over when he works (Tr. 267-268).

Daniel Inskeep

Mr. Inskeep was hired at CF&E as a student conductor trainee in July 2004 when the company was starting up. After about thirty days, he was promoted to conductor, and to engineer in June 2006. He worked for a time in 2007 as a foot board yard master, which is a position generally given to a conductor. In this position, he was a groundman, and did a lot of switching in the yard, but also had some say over what happened in the yard; he told crews where to bring the trains, and how to switch, and helped out in the general vicinity of the yard (Tr. 273-274). Mr. Inskeep worked with Mr. Oakes a few times in 2008 when he was a foot board yard master. At some point, he went to Warsaw on the WAVA job (Warsaw to Valparaiso), and began working with Mr. Oakes; they were crew members together on Mr. Inskeep's first job there (Tr. 273).

Kyle Furge

Mr. Furge was hired at CF&E in November 2007. Previously, he worked for Norfolk Southern from the end of 2006 to May 2007 as a conductor (Tr. 321). At CF&E, Mr. Furge was also an officer in the union, as well as a legislative representative, dealing with safety on the property, and bringing unsafe condition reports to management's attention (Tr. 323). He reported safety issues on behalf of other employees (Tr. 324).

Carolyn A. Combs

Ms. Combs began working for CF&E on December 22, 2008 as the office manager at the Ft. Wayne yard office (Tr. 388). She stated that part of her job was to monitor employee attendance, but she had not yet taken over this function in December 2008 (Tr. 391).³ Ms. Combs testified that she received an electronic attendance file by email from Mr. Moss (Tr. 409). This recorded vacation time, personal time, excused absences, and unexcused absences by employee and month (Tr. 391). She identified Complainant's Exhibit 22 as Mr. Oakes' 2008 attendance tracking calendar (Tr. 392). She stated that it did not show any vacation time in August, and nothing in December for the time he marked off for sick leave. There was some shading on October 11, but she stated that this would have been highlighted on the computer to show the type of absence (Tr. 392). However, she stated that there were no electronically kept records regarding Mr. Oakes' request for time off in December 2008; she was not tracking it at that time (Tr. 393).⁴

Steve Wyatt

Mr. Wyatt started at CF&E in February 2008 as the office manager; at that time, Jim Busser was the general manager (Tr. 415-416). He previously worked for Norfolk Southern from 1992 to 1999. He described Norfolk Southern as one of the major class one railroads in the eastern half of the United States. In contrast, CF&E, a wholly owned subsidiary of RailAmerica, is a shortline railroad, which operates about 270 miles of railroad on the former Pennsylvania, Penn Central, and Conrail property that runs from Crestline, Ohio to near Chicago at Tulleston (Tr. 415). CF&E operates about nine jobs a day, and has about 25 employees, five of them in the mechanical department (Tr. 416).

As an office manager, his primary responsibility was entering payroll, and being the local contact for the payroll and purchasing and procurement process; he entered requisitions under certain purchasing limits, and entered purchasing orders into the accounting systems. Mr. Wyatt had quite a bit of responsibility for keeping personnel and general records (Tr. 417).

There was no office manager at CF&E before Mr. Wyatt started; the responsibilities were divided between the staff at East Peoria on the TP&W, and the staff in Cincinnati on the Ohio Railway. The records were kept in both places (Tr. 418). The first thing Mr. Wyatt did was to retrieve all of the records and bring them to Ft. Wayne. At that time, with no office staff or general manager, the first line supervisors were the train masters; there were three then, while there were two at this time (Tr. 419).

³ According to Ms. Combs, Mr. Moss, who was the senior train master, kept a handwritten calendar for all employees, by calendar year. She recalled that she had seen a 2008 calendar, but when she looked for it, she could not find it (Tr. 410). She did not recall seeing whether Mr. Moss noted that Mr. Oakes was taking off for an indefinite duration in December 2008; she did not see any handwritten calendars for December 2008, or for Mr. Oakes (Tr. 394, 412).

⁴ Mr. Oakes stated that he had never seen this document before. He could not see that it reflected anything, including the days he marked off in 2008. Mr. Oakes took two vacations in 2008, with one possibly being in September (Tr. 157).

Mr. Wyatt stated that he had some friction in the workplace with Mr. Busser. In July 2008, Mr. Wyatt was appointed train master after another train master, Jamie Ferguson, resigned (Tr. 420). Mr. Wyatt worked as a train master in a relief capacity; he was still the office manager, responsible for scheduling work, making sure the crews had proper instructions, and that personnel were available to come to work. He was also the line of communication to the customers (Tr. 421).

Mr. Wyatt stated that Mr. Moss was the primary train master in Ft. Wayne, while Mr. Hall was the primary train master in Lima. Each train master was responsible for the crews and the work they did; they had separate crew bases (Tr. 422). From August 2008 to November 2008, the train masters managed the day to day operations, with the next officer in charge being the regional vice president. When Mr. Murphy started in November 2008, he hired an office manager [Ms. Combs], and Mr. Wyatt transitioned into his role as chief mechanical officer, where he initiated a mechanical department at CF&E.⁵ Previously, the mechanical responsibilities were handled by the Indiana and Ohio Railways mechanical forces, who maintained the locomotive units on site by visiting mechanical forces, or interchanged units and maintained them at Indiana and Ohio (Tr. 422-424).

Mr. Wyatt is currently the Chief Mechanical Officer, responsible for supervising the maintenance and repair of locomotives and rail cars (Tr. 414).

According to Mr. Wyatt, things at CF&E were a little bit more lax than he was used to at Norfolk Southern. He stated that Norfolk Southern is well known in the industry for being very strict about rules compliance (Tr. 427). Mr. Wyatt testified that front line supervisors are federally mandated to observe employees at work, for general work habits, and specific compliance rules; these observations are referred to as efficiency checks. He indicated that certain rules that are considered high priority are monitored in the field on a regular basis, for example, there a number of tests required over a certain time with respect to switches in the crossover being in corresponding position. The supervisors observe the crews for general rules compliance, and also for specific rules such as switch placement. It is also a federal mandate that each employee be observed quarterly (Tr. 428-429).

Mr. Wyatt was Mr. Oakes' train master, or supervisor, in September 2008 (Tr. 458). He stated that from February to December 2008, he had the opportunity to evaluate Mr. Oakes' work. He stated that Mr. Oakes was a competent conductor who often did good work, but who could appear to be very difficult to coach or supervise; he could easily become argumentative, and he had a temper, which he had lost in Mr. Wyatt's presence (Tr. 456-457).

Mr. Wyatt stated that CF&E has had quite a bit of turnover in employees. Part of the reason is that CF&E is a short line, with a short line pay scale. The class one railroads are constantly hiring, which is an economic draw for employees to move on (Tr. 457). Another reason is that the employees available to CF&E are often the ones who left employment at

⁵ Mr. Wyatt stated that he did not know Mr. Murphy personally, but knew that he worked at Norfolk Southern. He thought that, since Mr. Murphy was an officer at Norfolk Southern, he would expect an atmosphere of rules compliance and professionalism. Mr. Wyatt anticipated a change in atmosphere (Tr. 426). Mr. Murphy testified that there was no talk of tightening up rules compliance when he was brought in (Tr. 525).

another railroad either voluntarily, or were dismissed; some had rather checkered careers in the industry, and CF&E might be just another stop on the road for them. According to Mr. Wyatt, CF&E is referred to as the “currently fired elsewhere” railroad (Tr. 457). He thought this was a pretty apt description from when CF&E started in 2004, through 2008 (Tr. 457).

David Murphy

Mr. Murphy worked for Norfolk Southern from 1970 to 2008. He started as a fireman, and was promoted to engineer, road foreman, and trainmaster, and finally a division road foreman. He spent about twelve years in management, where he had occasion to discipline employees. Mr. Murphy testified that he had received training in investigating incidents, and performing rule checks, efficiency checks, and safety audits. According to Mr. Murphy, Norfolk Southern is known as a very tough railroad with respect to rules compliance, which was his experience as well. This allows for a safer railroad, and reduces incidents. Mr. Murphy stated that Norfolk Southern has won the Haraman award, which goes to the safest class 1 railroad each year, for 21 years in a row (Tr. 487-489).

When Mr. Murphy was approached by CF&E management, he knew that Mr. Busser, the previous manager, had been dismissed.⁶ Mr. Murphy was asked to take his place. Mr. Murphy had worked primarily in transportation at Norfolk Southern, and was not familiar with financial matters. In his new position at CF&E, he had oversight responsibilities for financial, mechanical, and engineering, as well as transportation (Tr. 490). When he began, Mr. Murphy shared a small office with the office manager in the Ft. Wayne office, where he met a lot of the Ft. Wayne employees through their daily interaction. He stated that it was a pretty small building (Tr. 491).

Mr. Murphy testified that one of the first things he wanted to do when he started at CF&E was to “high rail” the railroad. He asked Mr. Peters, the roadmaster, to schedule him on a high rail trip from Tulleston to Ft. Wayne (Tr. 491-492). During this trip, they pulled alongside an engine being operated by Mr. Oakes and Mr. Inskeep. Mr. Murphy got on their engine and introduced himself; he thought that he knew who Mr. Oakes and Mr. Inskeep were before he got on the engine. Mr. Murphy recalled that he talked with them about his goals and ideas for the short line (Tr. 492).

Mr. Murphy testified that he mentioned to Mr. Oakes that he had heard he was a complainer, and that was a good thing, because they needed complainers. Mr. Murphy stated that he was a complainer as an engineer and fireman, and that was how things got done; anything that someone sees on the railroad that needs fixing should be brought to someone’s attention. This could be many things, including missing mile post signs and whistle post signs, ballast problems, or overhanging trees (Tr. 493). He could not recall who told him that Mr. Oakes was a complainer; he thought it could have been Mr. Millspaugh, who was in the Ft. Wayne yard office every day, and was a trainmaster until August 2008. Mr. Murphy thought he was told that Mr. Oakes liked to complain, or something like that; he assumed it was about safety issues (Tr. 527-

⁶ Mr. Murphy testified that as far as he knows, Mr. Busser was not dismissed for failing to enforce the rules, or be concerned about employee safety. No cause for his dismissal was given by management, although there were rumors of sexual harassment and missing property (Tr. 526).

528).

Mr. Murphy claimed that “complainer” was positive, and not a derogatory term. He was not sure that Mr. Oakes understood it this way, and looking back, that Mr. Oakes probably thought the new guy was calling him a complainer. He stated that Mr. Oakes gave him a funny look, and he was not sure that Mr. Oakes understood that he was saying it was a positive thing to be a complainer (Tr. 529). He did not recall telling Mr. Oakes that he could not pull the wool over his eyes; he stated that he is not that type of person (Tr. 494).

Mr. Oakes also recalled meeting Mr. Murphy in November 2008, when he and Mr. Inskeep were working on the WAVA job, and Mr. Murphy and Mr. Peters came by in a high rail truck (Tr. 113). Mr. Murphy came onto the engine at Warsaw, and introduced himself to Mr. Oakes and Mr. Inskeep (Tr. 113-114). He discussed some of his goals, and said that he had heard Mr. Oakes was a complainer. Mr. Oakes told Mr. Murphy that he could not really believe what he heard (Tr. 114). Mr. Murphy stated that he had been in railroad service a long time, and that they would not be pulling the wool over his eyes. Mr. Oakes told Mr. Murphy he had been in the railroad industry a long time himself. Mr. Murphy did not specifically refer to any of the reports Mr. Oakes had turned in, or identify the person who told him Mr. Oakes was a complainer (Tr. 114).

Mr. Inskeep recalled that the first time he met Mr. Murphy, he and Mr. Oakes were on an engine, waiting to get track authority, when Mr. Murphy and Mr. Peters came up alongside of them (Tr. 275). Mr. Murphy came up and introduced himself; Mr. Inskeep did not remember what Mr. Murphy said (Tr. 275). He did not recall Mr. Murphy call Mr. Oakes a complainer; he may have had his head outside, talking to Mr. Peters, who was in a high rail truck next to them on the track (Tr. 276).

He recalled speaking with Mr. Murphy later, perhaps in the summer of 2009, about Unsafe Condition Reports or safety in general. Mr. Murphy mentioned that day, and referred to talking to Mr. Oakes on the engine the day they met, about Mr. Oakes being a complainer, and about needing to get things done sometimes just by being a complainer (Tr. 277). Mr. Inskeep thought that Mr. Murphy was calling Mr. Oakes a complainer; he was not sure why Mr. Murphy brought this up while they were discussing safety conditions (Tr. 278).

Unsafe Condition Reports

Unsafe Condition Reports (“Reports”) are forms used by employees at CF&E to report unsafe conditions to management. According to Mr. Wyatt, CF&E encourages employees to report unsafe conditions. The Unsafe Condition Report process started in the days when there was not always a first line supervisor available, and it gave an employee the ability to reach out to someone when they were at a remote location and observed a possible safety risk. As supervision has come in house, CF&E has maintained this tool, which allows the men who are the eyes and ears in the field to record and pass along what they observe (Tr. 430).

Mr. Wyatt stated that the forms are kept in the general manager’s office, and in the office manager’s office. The blank forms are supposed to be in each crew reporting area, where the

crews have access to them. Mr. Wyatt stated that before he arrived, the completed forms were sent by fax to the Ft. Wayne office, or they were placed in a box for the train master or general manager. They were sometimes handed to him if he was in the office, and he made sure that they went to the appropriate person, or to the general manager. The recipients are required to respond, and get back to the general manager as soon as possible with their response. A copy of the form always went to the general manager, who monitored and frequently questioned the officers if they had not responded (Tr. 430-431). Mr. Wyatt stated that Mr. Busser kept a file of completed Unsafe Condition Reports in a filing cabinet in his office (Tr. 432).

Mr. Wyatt did not recall seeing the Unsafe Condition Reports at Complainant's Exhibits 2, 11, or 13, but stated that they were fairly typical, and reflected nothing that would cause an "extraordinary" amount of harm for the railroad. They were "routine" (Tr. 433).

Mr. Murphy stated that Unsafe Condition Reports are a helpful management tool, and he has used them in staff meetings with officers, and in town hall meetings. In his experience, employees file these in good faith. Although management tries to address the issues raised in these reports, sometimes things do not get done right away (Tr. 515-516).

Mr. Murphy testified that they did not have safety reports, or unsafe condition reports, at Norfolk Southern. He liked the idea of having a format to bring in safety concerns (Tr. 495). Mr. Murphy did not have an understanding of how the safety reports were handled or filed at CF&E before early 2009, when a more formal procedure for handling the reports was initiated. He stated that there was a file in his desk with some old reports, which he would have eventually given to Ms. Combs, but he did not recall looking through the file (Tr. 497).

According to Mr. Murphy, sometime in November 2008, Mr. Furge came to his office and introduced himself; he had a sheet of safety reports that he wanted to review (Tr. 495). Mr. Murphy recalled that they talked for fifteen minutes to a half hour. He could not recall going over every report with Mr. Furge. They discussed how the reports were done, and Mr. Furge gave him some of the reports, which he stated he would have sent to the responding party, mechanical, engineering, or transportation, so that they could do investigations and give him an evaluation. He did not recall the names on the reports (Tr. 495-496).

Mr. Murphy did not recall seeing any Unsafe Condition Reports filed by Mr. Oakes (Tr. 513). He acknowledged that it was not unusual that he would not see a particular report, and this was part of the problem – some of them went to Mr. Peters or Mr. Moss, or even Mr. Hall in Lima, and he would not see them (Tr. 513). Nor did he recall seeing Mr. Oakes' time claim regarding the seating issue on the locomotive, although he acknowledged that it may have come across his desk.⁷ But he stated that even if he had seen Mr. Oakes' Unsafe Condition Reports, or his time claim, it would not have made any difference in his decision regarding the appropriate discipline for Mr. Oakes. These issues had nothing to do with discipline, and he did not consider anything other than Mr. Oakes' conduct as reflected in the investigation transcript and previous discipline history (Tr. 513-514).

⁷ Mr. Oakes sent a letter to Mr. Murphy by certified mail on December 15, 2008, setting out the findings on his time claim, and his dispute of the efficiency test. The certified mail receipt was signed by Mr. Wyatt on December 17, 2008 (CX 16).

Mr. Furge, who reported safety concerns on numerous occasions on behalf of himself and others, including a few for Mr. Oakes, also testified about the safety briefing with Mr. Murphy at his office in Ft. Wayne in November 2008 (Tr. 349).⁸ Mr. Furge testified that at this meeting, the Unsafe Condition Reports were all laid out, with some on his lap, and some on Mr. Murphy's lap, all in view (Tr. 352). Mr. Furge went through the Reports with Mr. Murphy; he recalled that he raised three concerns of Mr. Oakes, including two Unsafe Condition Reports Mr. Oakes submitted for Warsaw, involving a rail and crossover that were hard to throw (Tr. 350).⁹ He and Mr. Murphy discussed these reports, as well as the report about the Selby Crossover (Tr. 351, CX 11).

Mr. Furge also stated that he and Mr. Murphy discussed one issue that was not in writing, the problems with the water box in the locomotives (Tr. 353). He stated that the box needed electrical power to keep from freezing in the winter, but the cord was a tripping hazard, and an electrical hazard if cut. Mr. Furge wanted to see in good faith if this issue could be dealt with without making a written Report (Tr. 353). However, when Mr. Furge left in January 2009, it had not yet been addressed (Tr. 354).

Mr. Furge stated that after the meeting, he felt pretty confident that he and Mr. Murphy would have a good working relationship on those issues; but this was not to be the case (Tr. 352-353).

Reports of Safety Violations by Mr. Oakes

When he started at CF&E, Mr. Oakes worked from the "extra board," an on-call list for persons to fill in slots, for about six months, before he got his first regular assignment, which was the Chicago job (Tr. 45). Mr. Oakes testified that he has always had concerns about railroad safety. The first year he worked for South Shore, he was almost called to work on a job where a man was crushed between cars. This made quite an impact on him (Tr. 45). For twenty years, he was a union representative, where he tried to get on as many safety duties as he could. He turned in reports on issues he felt were unsafe at South Shore, as well as at CF&E (Tr. 46).

Mr. Oakes was sure that he made verbal reports numerous times to the train master or supervisor in the office. In particular, he stated that he talked to Mr. Millspaugh and Mr. Ferguson, the train masters, numerous times about the condition of the rail behind the track and switches (Tr. 206). He was told many times that CF&E was a short line, and did not have the money to fix all the conditions that needed to be fixed (Tr. 45-46). Mr. Oakes felt that there needed to be a paper trail to protect himself and other employees, because he did not feel like anything was being done. The first time he filed a Report was in April 2008 (Tr. 47).

⁸ Mr. Furge stated that he kept blank Report forms were kept in a file cabinet next to a desk in the hallway; he kept extra copies in case people called about filing a Report (Tr. 371-372). He stated that the Reports were always addressed in some manner, such as talking about them, but they were not always addressed properly (Tr. 375).

⁹ Complainant's Exhibit 11 is an Unsafe Condition Report filed by Mr. Oakes, dated November 5, 2008, regarding switches at the Warsaw yard that were hard to throw; a switch problem at the Selby crossover; and gaps at the Hamlet crossover.

April 28, 2008 Report

Mr. Oakes identified a Report that he filed dated April 28, 2008 (CX 2). In this Report, he noted that crossover switches needed work, they were hard to throw on, and the stand wobbled. According to Mr. Oakes, these were problems that could be handled by going out and adjusting the switches. He stated that if switches were gapped, they could cause derailments. This particular switch was hard to throw, and you had to stand on the handle to get it to latch on; he stated that this was a violation on any railroad he had worked on. He felt that the main issue was that the terminal track had lots of broken ties, and the rail chattered; it needed to be upgraded a little bit to keep cars on the track without dumping them (Tr. 48-49).

Mr. Oakes did not remember where he obtained the blank form for this report, but he thought that they were kept on the desk or in the hallway of the crew room.¹⁰ He turned the form in to the train masters; there was usually a slot on the door for the forms, if the supervisor was not in. He believed that he would have turned in this report to the train master box; he was sure that he turned it in, he just did not know if he handed it to the train master or put it in the box. The train masters would have been Mr. Millspaugh and Mr. Ferguson, who shared an office that then became Mr. Moss's office (Tr. 53). Mr. Oakes made a copy before he submitted the report (Tr. 54). He wrote up the issue that he thought was an unsafe condition (Tr. 49).

Mr. Oakes did not receive any response, and when he returned, he spoke with Mr. Busser and Mr. Millspaugh (Tr. 50). Mr. Busser told Mr. Oakes that they were just a short line. Mr. Oakes told him that he worked for a short line at South Shore (Tr. 51). Mr. Oakes spoke to Mr. Busser when he had to return to work in this area, and tried to discuss the issue with Mr. Busser and Mr. Millspaugh over the next few months (Tr. 52). According to Mr. Oakes, his written report was the last resort, to make sure that his complaint was in writing, and reported (Tr. 52). He never received a response (Tr. 55, 205).

November 5, 2008 Report

Mr. Oakes identified a Report that he filed dated November 5, 2008 (CX 11). In this Report, he noted problems with the ties at the yard office, the switches at the Selby crossover, and a gap in the Hamlet crossover. Mr. Oakes stated that he faxed this from the Warsaw yard office to the officers at Fort Wayne (Tr. 81). Mr. Oakes assumed that the date and time information printed at the top of the form (5-15-07, 7:53) was already on the form; it is identical to the information on the Report he faxed from the Warsaw office in connection with the seating issue (Tr. 83, CX 13). He did not recall the number he dialed; he stated that he used the fax number that they used to send all of their paperwork (Tr. 83). He thought that he just punched a button; he did not get a receipt (Tr. 84). Mr. Oakes testified that the next day, they came out and worked on part of the D rail discussed in his Report (Tr. 84). Although Mr. Oakes checked the box to indicate that he would like a response, he received none (Tr. 87).

Seating Issue

¹⁰ Mr. Oakes stated that the forms were kept in file cabinets, or could be obtained from company officials. He got the ones he filed either from the men he was working with, or from the top of a desk (Tr. 203). He stated that CF&E did not have really good paperwork, and the paper trails were few and far between (Tr. 225).

Mr. Oakes also testified about an ongoing problem with insufficient seating on the engines. He stated that some of the engines had three seats: a seat for the engineer, a seat for the conductor, and a general seat for the brakeman, but most of the engines only had two seats. If there were students or a third person on the crew, there were not enough seats (Tr. 56).

On September 29, 2008, Mr. Oakes was working as a conductor, with Mr. Wolfersheim as the engineer (Tr. 57). When Mr. Oakes got to work, Mr. Wolfersheim told him that they would be working with a student, David Baker, who had been working the job from Ft. Wayne to Lima, and was thinking of changing to the Lima to Ft. Wayne run (Tr. 58-59). Mr. Baker was there to learn the run in reverse. Mr. Wolfersheim told Mr. Oakes they only had one engine for the evening service (Tr. 58). When Mr. Oakes found out that they had a student, he went to talk to Mr. Wyatt, the supervisor train master, and asked him how he was supposed to show Mr. Baker anything when there were only two seats on the engine. He told him that the student was there to learn, but he would be seated on the floor or on a cooler (Tr. 59).

Mr. Oakes did not think it was safe, or a good practice for an employee or student to be seated on a cooler in the engine, where he was not able to see anything outside the window (Tr. 60). According to Mr. Oakes, Mr. Wyatt told him that they had no other engines, that there was nothing they could do, and it was just the way it was. He told Mr. Oakes that if it was any consolation, they would get an engine on the return run from Lima with enough seats for the crew (Tr. 59). The only other option was to remove the student for the day, and proceed with a two man crew (Tr. 60). Mr. Oakes told Mr. Wyatt that he had a problem with people having to sit on the floor; he did not think it was safe. He testified that there are lots of things that can happen in a locomotive, but at least if you have something to hang onto, and you can see it coming, you can brace for it. You cannot do that if you are sitting on the floor (Tr. 60).

Mr. Wolfersheim stated that it was pretty important to have trainees together with the crew, so that they could observe, apply rules, and help the trainee learn the job. The trainee needed a seat because it was a long ride, and he did not want to be standing, or sitting on the floor where he could not see out the windshield. It was also unsafe, because if there were a grade crossing collision or derailment, he could be thrown off balance very quickly. Mr. Wolfersheim likened it to not having a seat belt on in the car (Tr. 242). According to Mr. Wolfersheim, it is possible for cars to catch and push from behind, called slack action. With a seat, a person has a lower center of gravity, whereas if a person is standing, he can lose balance more quickly (Tr. 243).

Mr. Wolfersheim identified three daily locomotive inspection sheets that he submitted (CX 9). One of them, dated February 23, 2007, is a report of insufficient seats for the crew. He stated that he probably received no response from the company (Tr. 241). Mr. Wolfersheim stated that there were many times where he put in writing or just told someone that they needed another seat on a locomotive, and the response was yeah, we know, but nothing much ever happened (Tr. 241). He also identified reports he submitted on August 15, 2008 and August 20, 2008. Mr. Wolfersheim stated that at this time, nothing had been done to address the complaint about insufficient seats for the crew (Tr. 244).¹¹

¹¹ Mr. Wolfersheim stated that a few times they had trainees sitting in a second unit when they had two locomotives;

Mr. Wolfersheim recalled the incident on September 29, 2008. He stated that when he came into work, he noticed that there was only one locomotive; because they used it every day, he knew it did not have enough seating (Tr. 244). There was a student working with him and Mr. Oakes, so there would be three people and only two seats (Tr. 244). He thought that he discussed this with Mr. Oakes at their job briefing, where they went over their paperwork, and talked about situations that might arise. He recalled that they looked at each other, and noted that it would be interesting, because they had three people and two seats (Tr. 243 – 244). Mr. Oakes stated that Mr. Oakes was more concerned than he was, and raised questions with the trainmaster, Mr. Wyatt; it was Mr. Oakes' student more so than Mr. Wolfersheim's (Tr. 245).

Mr. Wolfersheim recalled that Mr. Oakes stood right in the doorway and talked to Mr. Wyatt; Mr. Wolfersheim was within five to ten feet, close enough to hear most of what Mr. Oakes said. Mr. Oakes questioned Mr. Wyatt, and asked for another locomotive or seat; Mr. Wyatt told him that it was all that they had that day (Tr. 246). Mr. Wolfersheim stated that it was unusual to have only one locomotive in Ft. Wayne; normally they had two. He stated that Mr. Oakes questioned whether they should send the student home (Tr. 246).

According to Mr. Wolfersheim, Mr. Wyatt told Mr. Oakes that it would be all right, and just to put up with it; when they reached Lima they would receive another locomotive with enough seats for everyone on the ride back. Mr. Wolfersheim and Mr. Oakes looked at each other, and did not feel that it was really right to go one way with insufficient seats, but at least it was only half of the trip. He stated that the trainmaster is the supervisor, and his word is final (Tr. 247).

Mr. Wolfersheim and Mr. Oakes talked more on the return trip; Mr. Oakes said that he thought it was really not right, and Mr. Wolfersheim agreed. Mr. Oakes thought that they needed to put in a claim, because it was unsafe. They had previously talked about this issue with a number of people, but nothing seemed to happen to change the situation (Tr. 248). According to Mr. Wolfersheim, the purpose of a time claim is to get a problem corrected, so nobody has a problem later (Tr. 248). He identified Complainant's Exhibit 4 as the time claim that was submitted (Tr. 248).

At the end of the day, Mr. Oakes turned in a written grievance, called a time claim, or contract claim, alleging that the engine was unsafe and not in compliance with safety regulations for the federal government, which say that safety has to be afforded to all individuals. Mr. Oakes was unsure of the exact wording of the regulation, other than it was a general stipulation that it must be safe for all people aboard the engine (Tr. 61). Mr. Oakes identified his daily time and delay report as Claimant's Exhibit 4; Mr. Wolfersheim also signed the time claim (Tr. 57). Mr. Oakes submitted this time claim for eight hours of pay; he stated that his objective was to make sure the seating problem was documented (Tr. 62). Mr. Oakes continued to work that day, and had no further discussions with Mr. Wyatt, who was the only one there, about the seating issue (Tr. 64). He turned in the time claim at the end of the day, in the train master's box (Tr. 65).

Mr. Oakes testified that he had previously put in a time claim, when customer service

this was not the best for training purposes, but it was safer (Tr. 264).

called him early, before his rest period was up, and told him he was supposed to be training another person (Tr. 63). Mr. Oakes was laid in for another eight hours, and the person he was supposed to be training worked the job (Tr. 63). Mr. Oakes put in a time claim for the crew work he should have been called for; his main goal was to be compensated for being laid in and not working (Tr. 64). In contrast, he submitted Claimant's Exhibit 4 to create safety on deck, and document the issue with the insufficient seating (Tr. 64).

After a few weeks went by and he received no response, Mr. Oakes sent his time claim by certified mail to Mr. Moss (Tr. 65, CX 5). In a cover letter, he noted that he had submitted a time claim for September 29, 2008 for what he assumed was a violation of the contract, but had not received any response from CF&E. He wanted to make sure it was documented, and he sent it by certified mail (Tr. 66). Mr. Oakes received the return receipt (Tr. 66).

Mr. Oakes subsequently received a denial letter through Mr. Moss, dated October 17, 2008; the claim was denied, because it was not in accordance with the current agreement (Tr. 67, CX 6). Along with the denial letter, Mr. Oakes received an efficiency test results form (Tr. 67). Efficiency tests are done by the railroad management to make sure that employees are in compliance with the rules (Tr. 68). They are supposed to be a training tool, but they can also be a disciplinary tool, as it is put in the employee's permanent record as a failure (Tr. 69). The letter Mr. Oakes received stated that Mr. Moss performed an efficiency test on Mr. Oakes on September 29, 2008 (Tr. 68). Mr. Oakes testified that he did not see Mr. Moss performing a test, nor was he approached about the test before he received the denial letter (Tr. 68).¹²

Mr. Wolfersheim did not recall seeing Mr. Moss that day, or seeing him performing any kind of efficiency test. He did not receive any notification that he had failed an efficiency test that day by taking a locomotive without adequate seating (Tr. 249). Mr. Wolfersheim continued to press this issue, mostly verbally, by stating that they needed more seats on the locomotives. It was possible that he wrote more inspection reports on this issue (Tr. 249).

Mr. Oakes stated that CF&E used the Norfolk Southern Rule book as their policy rule book (Tr. 71). In the denial letter, Mr. Moss claimed that Mr. Oakes violated Norfolk Southern Rule 592, which states that the conductor has a seat by the window, and must maintain seating for all people in the crew, on the lead engine if possible (Tr. 70, CX 30). Mr. Moss also stated that Mr. Oakes violated general rule E; although no one ever spoke to him about this, Mr. Oakes assumed that the general rule E violation was for taking out an engine that did not have sufficient seating for the crew during an efficiency test (Tr. 71).

Mr. Oakes was also charged with violation of Rule 582, the conductor authority rule. He thought this was because he was the conductor, and went out with a non-compliant engine (Tr. 72).

Although the denial letter indicates that Mr. Oakes was given informal training on the rules after the alleged violation, he testified that he never received any such training, nor did he even know about the alleged violations until he received the letter on October 17, 2008 (Tr. 69, 73). He denied the allegations that he violated any rules (Tr. 73).

¹² The Employee Efficiency Test Results reflect that they were printed on October 17, 2008 (CX 6).

At the bottom of the denial letter, there was a statement that if Mr. Oakes had any questions about accuracy, he should contact a supervisor or corporate safety officer. Mr. Oakes contacted Mr. Moss, his supervisor, and Mr. Grucher, the corporate safety officer, to advise them that he disagreed with the denial letter (Tr. 73-74). Mr. Oakes sent a registered letter to Mr. Moss about the seating issue on October 26, 2008 (Tr. 74, CX 7), and a certified letter to Mr. Moss on the same day with respect to the efficiency test, requesting an investigation (Tr. 75, CX 8). Mr. Oakes was concerned that the efficiency test results would be put in his personnel file as a failure, and would be in his service record. He did not feel that he violated any of the listed rules (Tr. 75-76). With respect to Claimant's Exhibit 7, he wanted to progress his complaint about inadequate seating through the grievance procedure (Tr. 76).

Mr. Oakes also sent a letter to Mr. Grucher about the efficiency test, and raised his concerns about inadequate seating; he enclosed a copy of the rule on which he relied, FRA Part 229.7, and Article 14, stating that engines shall be equipped with adequate seating ((Tr. 79, CX 9). He also attached documents he had gotten from Mr. Wolfersheim showing that seating on the same engine had been written up numerous times before.¹³ Mr. Oakes did not receive a response from Mr. Grucher (Tr. 79).

Mr. Wyatt stated that Mr. Moss asked him about the time claim submitted by Mr. Oakes and Mr. Wolfersheim. Mr. Wyatt did not investigate the incident; Mr. Moss asked him if he knew anything about it, and whether the crew operated a locomotive with insufficient seats (Tr. 433-434). Mr. Wyatt told Mr. Moss he did not know anything about the incident. According to Mr. Wyatt, it is not common at CF&E to have three people on a locomotive with two seats; most locomotives had three seats. He stated that when crews were assigned, if there was a student, the train masters were careful to assign them a locomotive with adequate seating (Tr. 435). The time claim indicated that a student went with the crew, and Mr. Wyatt thought that Mr. Moss had verified that the student, David Baker from the Lima crew base, worked on the assignment (Tr. 435).

Mr. Wyatt stated that Mr. Baker would have had to come from Lima to get on the train; the train master in Lima was Anthony Hall. He thought that it was most likely that Mr. Moss assigned the crew, and communicated with Mr. Hall to have Mr. Baker available. Mr. Wyatt thought that the train masters would have planned on using a certain locomotive, but the crew assignment could have been made the previous day or evening, and the available locomotives changed (Tr. 436).

According to Mr. Wyatt, when he was a trainmaster, if there was a student assigned and not enough seats, in most cases there would be a second unit available with adequate seating; this was pretty common practice. If there was no second unit, one of the crew members, the student, would have to be reassigned, perhaps for a yard job (Tr. 437). Mr. Wyatt stated that he did not personally direct Mr. Oakes and Mr. Wolfersheim to take out a locomotive with three people and

¹³ Mr. Wolfersheim reported that a locomotive needed a third seat on August 20, 2008; and that there were insufficient seats for the crew on August 15, 2008 and February 23, 2007 (CX 9). Mr. Wyatt testified that he did not know whether Mr. Wolfersheim received any discipline in August 2008 after he reported that a locomotive was used with inadequate seating (Tr. 462).

two seats. While it was possible that the train operated with three people in the locomotive, it was not possible that he told them to do that (Tr. 437).

Mr. Wyatt testified about the Daily Locomotive Inspection Reports, which he reviewed (Tr. 453). He stated that the engineers are required by CF&E to perform an inspection for each calendar day that the locomotive is operated, record the results, and turn it in with the daily paperwork (Tr. 453). The inspections cover anything of a mechanical nature, or a safety concern. He stated that it was not unusual to see safety concerns in these reports; it was very routine (Tr. 454). At the time of this specific incident, CF&E did not have full control of their fleet; maintenance and inspections were provided by another railroad (Tr. 454). According to Mr. Wyatt, one of Mr. Busser's most common complaints was that Indiana and Ohio did not have three seats on the locomotives. As soon as they started their own mechanical department, they undertook not only to increase the quality of the seats, to provide a safe place for employees to sit and work, but to make sure each locomotive was equipped with three seats (Tr. 454). Mr. Wyatt stated that it was pretty common for crews to complain about the seats on a locomotive (Tr. 456).

Mr. Wyatt testified that he did not discuss what type of management action would be taken with Mr. Moss (Tr. 438). Mr. Moss responded to Mr. Oakes with an efficiency test failure, for violating the rule requiring employees in the locomotive to be seated. Efficiency tests are not used for disciplinary or attendance purposes, or to enforce rules of conduct, and are not recorded in the personnel file (Tr. 438-439).

Omni Job

CF&E has an outpost in Warsaw, Indiana, with a yard office (Tr. 80). In November 2008, Mr. Oakes was working the WAVA job (Warsaw to Valparaiso), servicing a number of customers, including R.R. Donnelly, Flynn Eight, Inc., Cova, and Omni (Tr. 88). The job involved switching empty cars for loaded cars, and placing cars at doors as customers requested, as opposed to a road job where they do a long haul on the locomotive (Tr. 88). Mr. Oakes stated that on November 6, 2008, at 9:00 a.m., he received instructions to provide service to Omni, by way of a crew instruction form from CF&E to Mr. Inskip (Tr. 88-89, CX 12). Mr. Oakes testified that he received one of these forms from customer service for every job he worked, where the train masters informed him who the crew would be and the jobs they would be performing (Tr. 89).

Mr. Oakes described the normal procedure used to service CF&E's customer Omni. Using a diagram, he described Omni's track as a single main "stub" track that runs from east to west. A "stub" track does not connect back to the main railroad (Tr. 91). Mr. Oakes' starting location was in Warsaw, traveling west. Normally, to service Omni, the crew would pick up the cars, pull them west to Valparaiso, thirty miles away, pull into a runaround, release the cars from the engine and tie the hand brake on, and bring the engine around back to the main line, where the cars were reconnected to the engine. The cars were now behind the engine, which was headed eastward. The engine then proceeded back east, with the Omni cars at the end of the train. When they reached the Omni stub track, the engine shoved the cars backward onto the Omni track, and the engine was cut away and pulled back out. This maneuver was normally

done two to three times a week (Tr. 91-95).

This crew instruction form advised that Omni needed to be serviced more regularly, and instructed the crew that, if there was not enough time to service Omni going westbound, they were to shove the cars off to the Omni track (Tr. 89). This would require the crew to shove the Omni cars backwards, with the engine in the rear, all the way from the Warsaw location, to the Omni stub track, where they would be shoved onto the stub track and cut away (Tr. 95-96). As the conductor, Mr. Oakes would be on the leading edge, on the point of the end car (Tr. 96). Mr. Oakes testified that he would be riding in a scrap gondola, which is not a full sized car, but is like a half boxcar, open ended and open topped for scrap. He would be standing on the stirrup steps, which are like a ladder, and holding onto handgrips, for about thirteen miles, at fifteen to twenty miles an hour (Tr. 96-97). Mr. Oakes estimated that with stopping for breaks and resting his arms, this would take one to two hours (Tr. 97).

Mr. Oakes objected to this instruction (Tr. 98). He testified that earlier in the week, he had talked with Mr. Moss about Omni's complaints that they were not being serviced on a regular basis. Mr. Moss talked with Mr. Oakes about making a shove to Omni; Mr. Oakes told him that he did not feel comfortable about doing this, and thought that it was an unsafe move (Tr. 98). They discussed options to get the service done. But yet two days later, he got the work order to shove the cars, even though Mr. Oakes had made it known to Mr. Moss that he did not feel comfortable with that move (Tr. 100).

According to Mr. Oakes, he was 55 years old, and hanging on the side of a scrap gondola was not the most convenient way to ride a car; it hurt his back, arms, and legs, and it was hard to hang on. He stated that some cars were easier to ride this way than others, and sometimes a person could wrap an arm around a ladder and hold on, but the scrap gondolas are pretty much locked in one position. Mr. Oakes questioned the move because of the numerous road crossings and towns they would go through; the move did not make sense to him. He testified that there was no way for him to stop traffic; he did not have a whistle to let people know he was coming. He would be on the leading edge of the car with nothing to warn traffic he was coming.¹⁴ He did not feel safe making this move (Tr. 99).

Mr. Inskeep remembered working with Mr. Oakes on November 6, 2008, on the job servicing Omni. He reviewed the instructions at the beginning of the tour of duty, and talked about the long shove to Omni with Mr. Oakes (Tr. 278-279). Mr. Inskeep stated that he had done that long of a shove before, from Warsaw to Omni, maybe ten times (Tr. 279). While he did not personally have concerns working the shove, it was a concern if he was working with someone who did have concerns. In this situation, he would defer to the conductor if he was concerned about the safety of the shove, because he was the one performing and riding on the hood. As the engineer, Mr. Inskeep sat in the locomotive; he was not riding the point (Tr. 280).

When Mr. Oakes received the instructions on November 6, 2008, he tried to call Mr. Moss on the phone, but was not able to reach him (Tr. 100-101). He then called Mr. Wyatt, the

¹⁴ Mr. Oakes acknowledged that as the conductor, he had the authority to order the engineer to slow down or stop, and could take a break after a half mile, and that shove moves were made on normal occasions on the railroad (Tr. 214). But a shove of 12 miles was not typical, and he had not done that move at CF&E (Tr. 233).

train master, and told him he had concerns with the work instructions from customer service, and wanted to make sure they were correct for his crew (Tr. 101). Mr. Wyatt stated that the instructions were correct. Mr. Oakes told him that he did not feel comfortable doing this move, and if Mr. Wyatt wanted him to make a shove, he would do it with a caboose or shoving platform, something he could stand on and provide whistle protection (Tr. 101).

Mr. Inskeep recalled that they talked to Mr. Wyatt and Mr. Moss, probably about this shove, and that Mr. Wyatt told them that the shove needed to be done (Tr. 281). Mr. Inskeep stated that no one let Mr. Wyatt know that he did not feel it was safe (Tr. 281). Mr. Inskeep felt that there had probably been numerous occasions where a safety concern was raised, but the train master decided that the customer service issue trumped the safety concern (Tr. 281). Although he reported safety concerns, or talked about them with his boss, generally they wanted to get the job done, and told them not to do it. He could not recall a specific example (Tr. 282).

Mr. Wyatt also described the customary method of delivering cars to Omni, which involved a switch on the eastward move, west of the crew base at Warsaw, where the engine could run around the train and service Omni on the eastbound move (Tr. 439). He did not think that CF&E ever required crews to shove the car up the track to Omni. However, he acknowledged that Mr. Oakes was given instructions to do just that, and because Mr. Moss, who issued the instructions, was not available, Mr. Oakes called him (Tr. 440).

Mr. Wyatt told Mr. Oakes that he would not contradict Mr. Moss's instructions, and if those were the instructions, that was what Mr. Oakes was expected to do (Tr. 441). He noted that CF&E frequently shoved cuts of cars in Van Wert, Ohio, where the customer was at the end of a three mile piece of track, and there was no way to service them without pulling south, and then shoving back north. He stated that the conductor can ride the rear car between crossings. There are specific rules for safe movement over crossings, depending on how they are equipped. According to Mr. Wyatt, in most cases, the conductor stops and protects each crossing on the ground (Tr. 441).

Mr. Wyatt stated that if there were gates and lights at a crossing, which could physically be seen to be functioning, or if there was not an individual at the crossing or a vehicle approaching, the crew could shove across the crossing no faster than 15 miles per hour. If there were no gates or lights at the crossing, and a vehicle was at or approaching, the train must stop, and a crew member must occupy the crossing, and protect it for the train movement, by standing in the road with a flag to warn traffic that a train is about to come through (Tr. 442). This is very inefficient, but sometimes there is no choice. Mr. Wyatt recalled that at Norfolk Southern, in one of his first assignments as a brake man, he had to ride in the rear car and protect a ten mile shove (Tr. 443). He did not think it was inherently unsafe to shove cars in front of a locomotive; it was inefficient, but not inherently unsafe if done in compliance with FRA rules (Tr. 444). He acknowledged that it depended on the situation and what options were available, but obviously being able to run around the train and come back was a preferable option to shoving all the way to Omni (Tr. 463).

According to Mr. Wyatt, the shove from Warsaw to Omni is about 13 miles (Tr. 460). He stated that when he worked at Norfolk Southern, they had gondolas with a burrow crane, and

frequently a caboose would be provided for use as a shoving platform. Using a caboose lets you stand on the platform at the rear, and still be outside the gauge of the rail as required by the rule, without having to be on the side of the car on a ladder (Tr. 460). All of the cabooses he has seen have whistle control, and frequently a brake is available (Tr. 461).

Mr. Oakes also explained that with a shoving platform or caboose, there is a way to stop the train if necessary, and there is a whistle signal to advise traffic that you are coming. They also provide a better place to stand. Mr. Oakes stated that if he had been asked to use a different type of car, he might have taken it. But Mr. Wyatt told him that they were a short line, they did not have a caboose, and they did this every day. Mr. Oakes did not argue with him further, but he did not make the shove. Instead, he did the move the way it was done a long time ago, but he had to violate a rule to get the cars to Omni. He took the car out to the Omni stub, cut the engine away and left the car on the main line, and called Omni to come out with their track mobile and pick up the car. This was a rule violation, because they were holding track authority, which nobody else could breach; bringing a track mobile out was not proper. But Mr. Oakes felt it was the only option, and that it was safer than riding on the back of a shove (Tr. 102).

Mr. Oakes did not turn in an Unsafe Condition Report that day, but the next day, he submitted an Unsafe Condition Report, which he signed and dated November 6, 2008 (Tr. 104, CX 13). He faxed this report from the Warsaw office to the Ft. Wayne office (Tr. 105). In his Report, Mr. Oakes stated:

Today I was ordered to shove cars 13 miles if time does not allow me to go west to run around cars. This is unsafe for employees hanging on the side of gond or any other car. speed must be sacrificed for safety. Not the other way around.

(CX 13). Mr. Oakes stated that the date and time information on the top of the page was not accurate, nor did he get a fax receipt (Tr. 105, 106). He also put Mr. Eric Hill's name on the bottom. Mr. Hill was the general chairman for the union, and the local officer. Mr. Oakes called Mr. Hill, who was the go-between between management and employees on issues including safety, to let him know about the incident (Tr. 107). Mr. Oakes had no doubt that he sent this Report on November 6, 2008 (Tr. 108).¹⁵

Mr. Moss called Mr. Oakes the next day, and said that there might have been some confusion about the previous day's work order (Tr. 109). Mr. Oakes told Mr. Moss that he had called because he thought there might have been some confusion as well, but that Mr. Wyatt assured him there was nothing wrong with the work order (Tr. 109). Mr. Moss told him that they were not trying to ask him to do something he felt unsafe doing, but Mr. Oakes told him that was not the way Mr. Wyatt made it sound the day before (Tr. 109). Mr. Moss asked Mr. Oakes if it would be possible to do a drop at the Omni location, and let the car roll in on its own (Tr. 109).

Mr. Oakes described this move, in which the locomotive would go west, with the engine on the front, and pull the Omni car just short of the Omni switch. The car would be cut away, and air released and brakes locked. The engine would be pulled past. Then they would release

¹⁵ Mr. Furge testified that he got a call stating that they wanted Mr. Oakes to perform a shove in Warsaw, on the side of a gondola (Tr. 373).

the brake and bleed off the air, and hopefully the car would roll into the Omni track due to the grade on the rail. This is called a gravity drop (Tr. 110-111).¹⁶ Mr. Moss asked Mr. Oakes if they could do that with Omni, and Mr. Oakes told him that they could not. The CF&E rule book states that gravity drops are only done in certain locations, and the Omni track was not one of them (Tr. 111, CX 10 – CFE Order Number 1608, October 29, 2008). According to Mr. Oakes, the locations listed in this rule are the only approved locations for making gravity drops. He noted that Mr. Moss was suggesting that he violate a rule to get the cars into the Omni track (Tr. 112).

Respondent's Exhibit 11

According to Ms. Combs, at some point (she did not indicate precisely when, although it was after Mr. Oakes filed his OSHA claim) Mr. Murphy and counsel asked her to gather all of the Unsafe Condition Reports filed in 2008 and 2009, as well as any that may have been filed by Mr. Oakes (Tr. 563-564, 566). Ms. Combs checked with the trainmaster to see if he had anything in his office, as well as Mr. Wyatt, the roadmaster, and Mr. Baker and Mr. Woods, to see if they had any records (Tr. 565). She did not find any Reports filed by Mr. Oakes.

Ms. Combs stated that she had no reason to think that there were any Reports other than those that are in Respondent's Exhibit 11 for the 2008-2009 time frame; to her knowledge, there were no additional Reports that never made it to the file (Tr. 567). She acknowledged that it was possible that someone turned in a Report before she was involved in the process, which never made it into the file (Tr. 567). Although she made some effort to gather Reports from 2008, she could not say that the ones she gathered were the only Reports received by CF&E in 2008, because she was not working there, and did not start keeping the file until 2009 (Tr. 390, 575). She did not know how many were received in 2008 (Tr. 575).

Mr. Wyatt testified that as office manager, one of his duties was to receive Unsafe Condition Reports; he did not monitor how they were handled (Tr. 464). Mr. Wyatt made sure the reports got to the appropriate officer, with the originals to the general manager, and a copy to the department. He did not retain a copy, nor did he ever receive the reports back. Sometimes an annotated copy would come back to the general manager (Tr. 465). Mr. Wyatt stated that the originals were always kept by the general manager, who was Mr. Busser at the time. He was not able to tell from reviewing Respondent's Exhibit 11 if they had ever received a report from Mr. Oakes. He stated that they could have received a report from Mr. Oakes, but he would not necessarily remember, because he did not see all of the reports (Tr. 466).

Mr. Wolfersheim identified an Unsafe Condition Report dated June 12, 2009 that he turned in, regarding unsafe brush conditions just outside Decatur, where there were Hawthorne trees in the gauge of the train (Tr. 257, RX 11).¹⁷ He stated that these trees have very sharp hard needles, and could badly scratch an employee who had to look out and back for a hand signal

¹⁶ Mr. Inskeep also stated that a gravity drop would not work at the Omni site, because the rail was not steep enough (Tr. 282). He identified CX 10, which prevented them from making a gravity drop at Omni (Tr. 283).

¹⁷ Although Respondent's Exhibit 11 lists only this one Unsafe Condition Report submitted by Mr. Wolfersheim, Mr. Wolfersheim remembered filing some before that, including a report for switches in Lima that were hard to throw, in 2007 or early 2008 (Tr. 269).

from the conductor (Tr. 257). According to Mr. Wolfersheim, the crews went through these every day, five days a week (the Decatur job) (Tr. 257).

In his Report, Mr. Wolfersheim noted that he had reported this issue to two train masters and a road master. Mr. Wolfersheim testified that he had told Mr. Wyatt and Mr. Moss that they needed to do something with the brush on the line; they told him they were working on it, but nothing ever happened. Mr. Wolfersheim saw Mr. Peters, the roadmaster, one day, and asked him why they were not continuing to cut the brush that had been cut further up the line, and Mr. Peters told him they were all out of money, and that was the most they would get cut down that year. Mr. Wolfersheim assumed that Mr. Peters had a budget for cutting brush, and had used it all up. He stated that much later in the year, employees went out and cut down the worst offenders by hand, but not all of the brush (Tr. 257-258).

Mr. Wolfersheim testified that he turned in between 8 and 10 Unsafe Condition Reports while he was at CF&E; he was never disciplined in connection with these reports, or for his time claim in connection with the seating issue (Tr. 263).¹⁸ Mr. Wolfersheim testified that he was never discouraged from filing Reports, and in fact agreed that he was somewhat encouraged to do so. Although he thought that sometimes CF&E was afraid that the employees turned in too many Reports on certain subjects, he thought that basically the company wanted to know if there was a problem. However, the follow up was not very good (Tr. 270). According to Mr. Wolfersheim, nothing was ever addressed or taken care of with respect to the questioning of safety issues. He stated that there were many different issues with the locomotives, some mechanical, and some safety, such as brakes not working properly (Tr. 255). Although there is a line on the report form that can be checked if an employee wants to be contacted, only once did he receive a reply (Tr. 270).

Mr. Inskeep identified an Unsafe Condition Report dated August 24, 2009, which appears on Respondent's Exhibit 11 (Tr. 307). He wanted to report that several switches were gapping. Mr. Inskeep called in this complaint to Mr. Peters, and also reported it to the customer (Tr. 307). The Report indicates that Mr. Peters addressed his concern, and he vaguely recalled that (Tr. 308).

Mr. Furge also reviewed Respondent's Exhibit 11, and stated that there were some 2008 Unsafe Condition Reports missing (Tr. 325). One of these was a report that he filed on May 29, 2008, discussing the D&D Lead on a branch track (Tr. 326, CX 57). The fax report reflects that this transmission was successful (Tr. 325, 375).

Mr. Furge also identified a Report that he turned in on July 28, 2008, regarding tracks in Decatur, Indiana that were overgrown with weeds. According to Mr. Furge, CF&E sprayed the weeds but not cut them down; they were still in the way, and causing tripping hazards (Tr. 329-330, CX 58).

Mr. Furge also identified Unsafe Condition Reports listed in Complainant's Exhibit 59, which he did not fill out himself, but which he knew were turned in, because he brought them up

¹⁸ Mr. Wolfersheim stated that he did not think he needed to submit an Unsafe Condition Report when he had submitted a time claim, because the same people would read it and should be able to respond (Tr. 262).

with the managers, and saw that they were addressed (Tr. 332). Mr. Furge stated that he knew that the August 24, 2008 and December 13, 2008 Reports were turned in (Tr. 333). The August 24, 2008 Report involved the bridges by Warsaw, which had bad walkways, with soft wood, and holes in the wood; you could see through the walkways to the creek. In addition, the first switch north of the main on the bridge over the river had a big hole, and you needed to stand to throw it. He recalled that CF&E repaired the hole, but he did not remember if the walkway issue was dealt with (Tr. 335-336).

The December 13, 2008 report involved the ballast at the crossover, which is the stone that the employees walk on. It was unsafe to get on the car because instead of the ballast being level, or at a good angle, it was pitched at a steep angle, and could not be used to get on the car. The employees had to go from a dirt road onto the car, using a ladder rung that hit between the waist and neck. Mr. Furge stated that he dealt with this report a little bit (Tr. 334).

Mr. Furge also identified a Report that he sent on November 25, 2008 (CX 14), that is not in Respondent's Exhibit 11 (Tr. 345). Mr. Furge stated that he faxed this Report, and received a printed confirmation; he put it in Mr. Murphy's box (Tr. 373). Mr. Furge reported that there was a gap between the rail and the head of the rail, which was chipped off. He was concerned about the track gauge, and wanted an inspection; he felt that the condition could cause a derailment (347-348). Mr. Furge stated that he talked about this condition at first with Mr. Murphy and Mr. Peters, but nothing happened, and he then put it in writing so that it would be dealt with (Tr. 345-346). It was not, and on December 15, 2008, there was a derailment on that track (Tr. 346). Mr. Furge stated that he heard that the track spread, or something similar, and cars came off the rail (Tr. 346).

Mr. Furge recalled that he learned of the derailment when he was in Mr. Murphy's office with Mr. Peters for an interview for track inspector. Mr. Furge told them that he had written this condition up, and that they could not charge the crew on the train, because it would come down to track conditions. According to Mr. Furge, the crewmembers are normally the fall people, but he had just written the track up, and CF&E could not say it was train handling, or blame the crew for the derailment, because the track needed to be looked at and worked on (Tr. 380).

Mr. Murphy, however, did not recall Mr. Furge notifying him in November 2008 about the danger of a derailment at the spot where a derailment occurred on December 15, 2008, although he stated that he could have done so (Tr. 530). He thought that in his meeting with Mr. Furge, where they reviewed the Reports, he may have seen Complainant's Exhibit 14, but he did not recall. Nor did he have any idea why Complainant's Exhibit 14 was not on the list of Reports compiled in Respondent's Exhibit 11 (Tr. 531). Mr. Murphy acknowledged that he had previously testified that he did not see any reason to keep Reports once corrective action was taken, and that he did not begin to keep copies in a separate file until early 2009. He did not recall receiving Complainant's Exhibits 15 or 16, the certified letters regarding Mr. Oakes' time claim (Tr. 531-533).¹⁹

¹⁹ Mr. Wyatt testified that he did not recall receiving these letters; they were addressed to Mr. Murphy, so he would have given them directly to him. He identified his signature on the return receipts dated December 17, 2008 (Tr. 467).

About a week to a week and a half after his meeting with Mr. Murphy and Mr. Peters, where he learned of the train derailment, Mr. Furge received a letter of investigation based on a charge of job abandonment (Tr. 381). Mr. Furge stated that on the date in question, he had worked for six hours, and completed all of his work, with the exception of servicing one customer they could not get to, Triple Crown (Tr. 357). According to Mr. Furge, Norfolk Southern (which dispatches the railroad and controls the train movement) told them that they would not get to this customer until after Mr. Furge would be “out long.” Mr. Furge explained that after twelve hours (when he is “out long”), he cannot do any more work on the railroad, under the FRA hours of service. As a result, Triple Crown was not served that day. Mr. Furge tried to call Mr. Moss, and left a message; he also called Mr. Hall, the lineman, but he did not pick up (Tr. 357). Mr. Furge left work early (Tr. 365).

According to Mr. Furge, it was common practice at the time that, if all your work was done, you could go home. Otherwise, he could have gotten overtime later in the week if he worked more time, which would be considered “stealing hours” (Tr. 377). He was not able to leave the yard, or service another customer, so he thought that he might as well go home so he did not get caught stealing time. He stated that both he and the engineer agreed to do this; the engineer was not disciplined (Tr. 378).

Mr. Furge was charged with job abandonment, but he was not taken out of service between the date he was charged and the date of the investigation (Tr. 358). After the investigation, Mr. Furge was terminated, but he appealed, and after arbitration, he was put back to work in September 2010, with no back pay (Tr. 365-366). Before his termination, he filed a whistleblower claim with OSHA, which was denied at the investigator’s level, but is in the process of being appealed (Tr. 366).

According to Mr. Murphy, Mr. Furge was disciplined because he was working a yard job in Ft. Wayne, and a customer needed switching. The customer was difficult to get to, but Mr. Furge had instructions to make sure that he serviced this customer. Mr. Furge tried to call Mr. Moss and Mr. Hall when he had difficulty getting to the customer, but could not get them, and decided to put off duty and leave. According to Mr. Murphy, Mr. Furge abandoned his job without permission (Tr. 523-524).

Mr. Murphy stated that the incident with Mr. Furge was the first big incident he was involved with at CF&E, and he did not want to come across as too heavy handed. Although job abandonment was a serious charge, Mr. Murphy felt that it would have been prejudging to hold Mr. Furge out of service before an investigation (Tr. 541). Mr. Oakes’ attendance issue turned out to be minor, but it started out as job abandonment (Tr. 540). But in Mr. Oakes’ case, Mr. Murphy did not feel that he was prejudging Mr. Oakes by asking Mr. Moss to remove him from service pending an investigation, because it was a different circumstance. He had a very angry employee, and could not afford to let him go out and work in that condition (Tr. 541). However, he acknowledged that Mr. Moss pulled Mr. Oakes out of service before he uttered the alleged vulgarity (Tr. 542).

Subsequently, Mr. Furge was disciplined twice (Tr. 367). Although Mr. Furge could not remember the exact charges, in November 2008 he signed a waiver, and accepted a letter of

reprimand in connection with a new policy to have students shadow him. There was no disciplinary hearing (Tr. 367-368, 383).

The second incident involved an alleged attendance violation (Tr. 369). Mr. Furge stated that he was working a five day job, Sunday through Thursday. On Thursday, he had to work late, and according to the contract, he could elect to work or not on his rest day. He elected to take a rest day, and in December 2010 he was charged with abandoning his job by leaving early without calling a supervisor (Tr. 365, 370-371). After a disciplinary hearing, he was terminated. Mr. Furge stated that for this attendance violation, the penalty was the last step, termination, when he was not supposed to be at this step in the process (Tr. 383). He noted that another employee who was working that day was also charged with an attendance violation, and received a sixty day suspension (Tr. 383). Mr. Furge filed an appeal with the Public Law Board, which is pending, as well as a whistleblower claim (Tr. 371).

Mr. Furge currently works for CXS. He stated that he was still hesitant to testify, because Mr. Murphy's son is the train master in Lima, Ohio for CSX, and could "put in a word" with the guys (Tr. 361).

Discipline of Other Employees

Mr. Murphy testified about discipline of other employees besides Mr. Oakes. He discussed an incident involving trains that were operated through a crossing with malfunctioning gates, which was a serious event (Tr. 516). Mr. Murphy stated that each train crew has a bulletin issued by a dispatcher, with a set of instructions, or things they need to look for. They could be conditions, a rail lying on the right of way, bad footing, a slow order for track that needs fixing, or a gate malfunction. These bulletins are sent by Norfolk Southern dispatchers by fax to the yard office (Tr. 516-517). CF&E operates under Norfolk Southern rules, because they dispatch the railroad, and are in control of the train movement. The bulletin is divided into sections, and in this case the order about the crossing with malfunctioning gates was in the wrong place. Nevertheless, he stated that the crew must read the entire bulletin to make sure they are not missing anything. In this case, two crews went through the crossing in a 24 hour period (Tr. 514).

The first crew got past the stop and flag, and called in and reported themselves; within 24 hours, another crew got past the stop (Tr. 548). Mr. Tarlton, who was on the first crew, had a previous decertification involving an improper air test. Although this was a decertifiable event, Mr. Murphy did not know if Mr. Tarlton was in fact decertified in connection with this incident (Tr. 518). Because of Mr. Tarlton's past, he received a worse punishment than his conductor, Mr. Paul Murphy, who received a time slip, even though the conductor is the one in charge of the train (Tr. 549-550).²⁰ The crew insisted on a formal investigation (Tr. 520). The Public Law Board overturned Mr. Tarlton's dismissal and returned him to work (Tr. 550).

The second crew, Mr. Broom and Mr. Pape, came to his office and admitted the incident, and took full responsibility, which he felt showed that they cared about their professionalism (Tr.

²⁰ Respondent's Exhibit 12 indicates that Mr. Murphy received a 24 day suspension in December 2008 for failure to stop and flag at a highway crossing.

519). Mr. Broom had no previous decertifiable events, and he was assessed thirty days (Tr. 519). Mr. Murphy did not recall what happened to Mr. Broom's conductor, Mr. Pape (Tr. 549).

Mr. Furge testified that Mr. Tarlton was terminated in January 2009 (Tr. 342). According to Mr. Furge, Mr. Tarlton apparently did not stop and flag a crossing, where the road went over the tracks. This was a serious violation (Tr. 342-343). Mr. Furge stated that Mr. Tarlton's defense was that the bulletin which listed the mile post of the crossing, and how it needed to be protected, was not in the right area (Tr. 343). The bulletin was listed in the spot for the section between County and Tulleston, where CF&E did not even operate at that time (Tr. 342-343). According to Mr. Furge, if a bulletin for Indiana was put in the spot for Ohio, Mr. Tarlton would not know it was there, because he would not be looking for Ohio. Mr. Furge thought that Mr. Tarlton probably thought that the gates would go down like normal; without seeing the bulletin, he would not know that he needed to stop and flag the crossing (Tr. 344).

Mr. Furge stated that in addition to the August 2008 Unsafe Condition Report listed on Respondent's Exhibit 11, Mr. Tarlton complained two other times about unsafe conditions (Tr. 339). He stated that in July 2008 Mr. Tarlton made a verbal report about the bathrooms in the locomotives, where the methane was so strong in the cabin that he was getting nauseated. Mr. Furge and Mr. Tarlton reported this together by calling the manager, who would have been Jim Busser or Cary Moss (Tr. 340). Mr. Furge was not sure if this was covered by any FRA regulations, but he had been on the locomotives, and it was bad; his eyes watered and he was nauseated. He stated that it would have been hard to ride all the way down to Decatur (Tr. 340).

Mr. Furge stated that about mid 2008, Mr. Tarlton also "got on" the mechanical guy for dumping the toilets along the right of way, straight on the ground, or between the tracks. Mr. Furge was a room away at the yard office, and heard Mr. Tarlton bring this up to Jim Busser; they went back and forth (Tr. 341).

Mr. Furge was also disciplined on occasions other than those discussed above. In August 2008, he was disciplined in connection with a failure to perform an air brake test; he admitted that he did something wrong, and took responsibility (Tr. 376)

Ms. Combs prepared Respondent's Exhibit 12, a list of employees disciplined in 2008, two to three weeks before the hearing, after looking at more than thirty files (Tr. 578). This document, which purports to be a "CF&E Record Review," lists the discipline imposed on employees following their filing of unsafe condition reports in 2008 and 2009. It also purports to set out the number of Unsafe Condition Reports filed by employees before being discharged by Mr. Murphy in 2009.

December 23, 2008

Mr. Oakes testified that as of December 17, 2008, the economy was starting to shut down. Although he had been working six days a week for 12 hours a day, CF&E was starting to lay crews in, which meant that they worked other crews on the job instead (Tr. 118). On December 17, 2008, Mr. Oakes was laid in, and not working; he figured that he should see his doctor for his problems with a persistent cough (Tr. 118-119). Mr. Oakes called customer

service, and told them that if he was not going to be working, to mark him up sick, and document that he was going home to see his doctor. Customer service told Mr. Oakes that he had to speak to the train master (Tr. 119).

The Customer Service Office is the Transportation Logistics Center in Vassar, Michigan. It is a 24-hour operation, which manages car billing, corresponds with customers, and manages crew boards. It is the response center for the crews to communicate with if they are unavailable for duty, in addition to their immediate supervisor. When a train master puts out instructions for a crew, the customer service office calls the crews to tell them to report for duty (Tr. 446).

Mr. Oakes then called the general office, and spoke to Mr. Wyatt; he told him that he was coming to the office to talk to him, but that he was marking off sick for a few days to go home to his doctor (Tr. 120). Mr. Oakes testified that his fiancée lived in Michigan City, which was two hours from Ft. Wayne; that is where he planned to see his doctor (Tr. 121). Mr. Oakes went to the office to speak with Mr. Wyatt on December 17, 2008 (Tr. 121).²¹ According to Mr. Oakes, Mr. Wyatt came out of his office, and asked him if he was going home.²² Mr. Oakes told him that he was, and that he had not been feeling well for a while. Mr. Wyatt asked him if he planned to see the doctor in Michigan City, and Mr. Oakes told him that he was. Mr. Wyatt told Mr. Oakes to let them know (Tr. 121).²³

Mr. Wyatt testified that the first indication he had that Mr. Oakes needed to mark off was an email from customer service that Mr. Oakes had marked off; he did not remember if the email indicated the reason (Tr. 445). The customer service center advised Mr. Oakes that he needed to contact a supervisor; Mr. Oakes called him, and told him that he needed to mark off to go to the doctor (Tr. 447). Shortly afterward, Mr. Oakes came into the office, to pick up the turkey that Mr. Murphy had bought for the crews, before he left for the holidays (Tr. 447). Mr. Wyatt stated that he asked Mr. Oakes if he was going to Michigan City to the doctor, because he knew this was Mr. Oakes' primary residence. Mr. Oakes stated that he was, and Mr. Wyatt asked him to advise them about the prognosis, and how long he would be off. He never heard back from Mr. Oakes, and did not talk to him until December 23. He had no idea when Mr. Oakes was coming back to work (Tr. 447).

Mr. Wyatt testified that Mr. Moss covered assignments off the extra board while Mr. Oakes was gone. Mr. Moss checked with him to see if he had heard from Mr. Oakes. According to Mr. Wyatt, they were very short on personnel heading into the holiday, and someone else had to work extra hours to cover. He stated that in situations like that, other assignments had to be abolished or customers put off (Tr. 448).²⁴

Mr. Wyatt testified that there was no specific training on the policy requiring an

²¹ Mr. Oakes stated that Mr. Wyatt did not mention the letters that he signed for that day, CX 15 and 15 (Tr. 121).

²² Mr. Oakes testified that Mr. Wyatt was aware that he was going to the doctor, and that he was marking off indefinitely. This information would have come to him through customer service (Tr. 120, 122).

²³ Mr. Inskeep testified that if Mr. Oakes was marked off, another conductor would have worked on those dates (Tr. 285). He stated that CF&E had someone to cover for Mr. Oakes on those days, because he did not remember being laid in during that time period (Tr. 286).

²⁴ Mr. Wyatt did not identify any specific assignments that were in fact abolished, or customers who were in fact "put off."

employee to call in every day during an absence of more than one day. He was aware that Mr. Oakes was not reporting to work, and not calling in for a couple of days. He did not call to check up on him; Mr. Moss did not say that he did so, and he did not know if anyone else did. According to Mr. Wyatt, Mr. Oakes' shift was covered from the extra board. He did not recall if the extra board was exhausted to cover Mr. Oakes' absence, but he did not recall any service interruption because of his absence (Tr. 472-473).

Mr. Inskeep testified that at that time, it was probably not the policy for an employee to call in every day if they were going to be off for more than one day. It depended on the situation, but it would happen that people marked off for multiple days without calling in each day, for example, if a person called in and they knew he was going to the doctor or was sick (Tr. 287). He received no training or tests on this subject (Tr. 286).

Mr. Inskeep stated that he took five work days off when his grandmother died in 2008 or 2009, and he did not call in each day (Tr. 287). He took multiple days off for the birth of his daughter in May 2006, and his son in February 2007; he did not call each day to update his status (Tr. 288-289). He recalled that he probably just let his managers know at the beginning; Mr. Hall may have called him the day before he returned to work. He was not disciplined any of these times (Tr. 289).

Mr. Furge was not aware that there was an attendance policy that required employees to call in every day; he never received any training on such a policy (Tr. 354). Nor had he ever heard of anyone getting in trouble for failing to call in during an absence of more than one day (Tr. 354). Mr. Furge stated that in the spring or early summer of 2008, he got food poisoning in Chicago, and marked off as soon as he got back; he was off for probably two to three days. He did not call in to report his status on the second and third day. He was never disciplined, or received any informal coaching (Tr. 355).

Mr. Furge was also off for five days for bereavement when his grandmother died in the first or second week of November 2008 (Tr. 355). He was not instructed to call in each day to report his status; he never received any discipline or informal training. Before Mr. Oakes was charged with failure to call in each day, he had not heard of anyone else being charged with such a violation (Tr. 356).

When Mr. Oakes left the yard office, he went to Michigan City to see his doctor, who told him that if he did not improve, he would have to be put in the hospital (Tr. 122). Mr. Oakes did not get a note from his doctor, because he did not think he needed one. He had not gotten a doctor's note to come back to work before, and had marked off previously without such a note (Tr. 123). When he first started working at CF&E, he was in a traffic accident on his way to work in Warsaw as a student; he broke a rib, and was off work for four days in one week, and three in the next.²⁵ He did not call in every day to check in, or provide a doctor's note. On that occasion, no one asked Mr. Oakes to call in, nor was he disciplined or given any informal training for not calling in every day (Tr. 123-124, 127).

Mr. Oakes stated that on December 17, 2008, Mr. Wyatt did not tell him that he needed

²⁵ Mr. Oakes provided a chart of his attendance and time off for 2008 (CX 21).

to call in each day to report on his status, nor has Mr. Oakes heard of anyone else who worked for CF&E having to do so (Tr. 127). Mr. Oakes saw his doctor on December 18. He did not call in on December 19 or 20, and December 21 and 22 were his rest days, or days off (Tr. 128). On December 22, Mr. Oakes called customer service to report that he was going back to work at his scheduled time on December 23, and to ask them to mark him up (Tr. 129).

On December 23, 2008, Mr. Oakes reported to the Ft. Wayne yard office about 15 minutes before his start time of 12:00 p.m. (Tr. 131). He went through his daily routine, and got his paperwork and work instructions from customer service. He greeted Mr. Inskip, and went to the desk in the hallway to sort through his paperwork. He sat down and started getting his list together, with tonnage and car numbers, so he could get his authority from the Norfolk Southern dispatchers (Tr. 131, 135). He was at his desk filling out paperwork about 12:00, when Mr. Moss came out of his office, approached him, and asked him to come into his office (Tr. 135).

When Mr. Oakes went into Mr. Moss's office, Mr. Moss asked him to close the door and sit down. Mr. Oakes knew that he was in trouble for something, but did not know what it was (Tr. 136). Mr. Moss asked Mr. Oakes if he was familiar with Page 9 of the attendance policy in the Rail America policy handbook. Mr. Oakes had received this handbook, and he told Mr. Moss that he knew the rule, but he did not realize there was a 24 hour call; he had never heard of it (Tr. 136). Mr. Moss told Mr. Oakes that he had violated the rule by not calling in for 36 hours, although he did not indicate what period of time he was referring to, either December 18, 19, and 20, when Mr. Oakes was off, or December 21 and 22, which were his assigned days off (Tr. 137).

Mr. Moss asked Mr. Oakes if he was incapacitated and unable to use a phone, and Mr. Oakes told him he was not. According to Mr. Oakes, Mr. Moss kept asking him if he were incapacitated, and Mr. Oakes asked him where he was going with it, what was going on, he did not get it. Mr. Moss then told Mr. Oakes that he had abandoned his job. Mr. Oakes denied doing so, and stated that he had talked to Mr. Wyatt before he left, and told him where he was going, and what he was doing. He suggested that they call Mr. Wyatt into the office (Tr. 138).

Mr. Moss went out and got Mr. Wyatt, and brought him to the office. Mr. Oakes got Mr. Inskip, who was his engineer, because he felt that he needed a witness, and brought him into Mr. Moss' office (Tr. 139).²⁶ Mr. Wyatt acknowledged his conversation with Mr. Oakes on December 17 about going to the doctor, and about customer service calling or emailing him. Mr. Moss told Mr. Oakes that he was being charged with job abandonment, and he was relieved of duty and pulled out of service (Tr. 139-140).

Mr. Oakes was upset, as he did not feel that he had done anything wrong, and should not have been removed from service. Although he thought that he may have raised his voice, Mr. Oakes stated that he was not yelling in Mr. Moss' office (Tr. 140). He walked out of the room, and went to the desk to sign off, and mark off his work reports. He had already started his day's

²⁶ Mr. Inskip testified that at that time, it was probably not the policy for an employee to call in every day if they were going to be off for more than one day. It depended on the situation, but it would happen that people marked off for multiple days without calling in each day, for example, if a person called in and they knew he was going to the doctor or was sick (Tr. 287). He received no training or tests on this subject (Tr. 286).

paperwork, so he had to sign off on it; he marked off at 12:30 (Tr. 140-141). Mr. Oakes planned to return to Michigan City for Christmas with his family. Mr. Moss asked him if he was going to stay on the property so that he could receive and sign for the investigation notice, rather than having it mailed out. Mr. Oakes assumed that Mr. Wyatt was preparing it; he said that he would wait for it, as he felt this would be easier, since he was leaving for Michigan City (Tr. 141-142).

At this time, Mr. Oakes was outside the office, by the crew room, talking on his phone with Mr. Hill, and telling him that he had been pulled out of service (Tr. 142).²⁷ Mr. Oakes stated that he was punching up Mr. Hill's number as he walked through the crew room. As he was walking out the door, Mr. Hill had just answered. Mr. Wyatt came out of the office, but Mr. Oakes could not understand what he was asking him. He turned around and said, wait a minute, I'll get back with you, and he walked out. He did not continue his conversation with Mr. Wyatt (Tr. 143).

Mr. Moss came out and got Mr. Oakes, and told him that the letter was ready; Mr. Oakes went back in and signed it (Tr. 144, 224).²⁸ According to Mr. Oakes, although he may have cursed at Mr. Moss when they were in his office, while the four men met, he did not curse at anyone after he left the office. He did not say "f--ing train master," nor did Mr. Wyatt say that he could not believe Mr. Oakes called him a "f--ing train master" (Tr. 146).

Mr. Oakes admitted that he has used the "F" word while working at all of the railroads where he has been employed. He has heard others use it, including management, and while he worked at CF&E, including from management (Tr. 147). He referred to one incident where train master Millspaugh berated him "up and down" for his mistakes on an assignment, peppered with the word. Mr. Oakes stated that they worked on a railroad, not in a chapel; in addition, this was not just railroad usage, but was everyday language. He stated that no one at CF&E ever told him that the use of vulgarity was offensive or grossly offensive (Tr. 148).

Mr. Wolfersheim did not recall if he was in the yard office on December 23, 2008 when Mr. Oakes returned (Tr. 250). He stated that he was not really aware that the company policy required an employee to call in every day they were absent; he did not receive any training on the handbook or the attendance policy. Mr. Wolfersheim had not heard of anyone being charged with violating the attendance policy by not calling in every day (Tr. 250). Mr. Wolfersheim stated that he has heard coarse language at CFE, from employees and some managers, just about any time when two men are in the same room or locomotive cab. He has never heard vulgar language directed at someone. Mr. Wolfersheim was not aware of anyone being charged with using grossly offensive language at work, other than Mr. Oakes (Tr. 251-252).

²⁷ Mr. Oakes diagrammed the office layout, with Mr. Wyatt's office in one corner, and a locker room and storage facility in another corner. The crew room was central, with a refrigerator, desk, and copy machine in a hallway area along the wall, where the entryway was. Mr. Moss and Mr. Peters were in offices off the crew room (Tr. 133-134).

²⁸ Mr. Oakes testified that Mr. Wyatt came out and got him and told him the letter was prepared, and he went back in and signed for it (Tr. 144). However, he then stated that it was Mr. Moss who came and got Mr. him as he was waiting for the investigation notice (Tr. 144-145). He acknowledged that at his deposition he stated that Mr. Moss gave it to Mr. Wyatt, who then printed it up and brought it out to him (Tr. 224). He stated at the hearing that this was not correct, that Mr. Moss came out to get him; he was the one who could sign the notice, and they both signed it together (Tr. 224).

Mr. Inskeep remembered the meeting in Mr. Moss's office with Mr. Oakes, Mr. Wyatt, Mr. Moss, and himself, on December 23, 2008. He stated that Mr. Oakes asked him to step into Mr. Moss' office, where there was a discussion about the attendance policy regarding Mr. Oakes. They were discussing whether Mr. Oakes' leave was indefinite, and whether he should have called in (Tr. 303). Mr. Moss said that Mr. Oakes did not call in every 24 hours while he was off (Tr. 290). According to Mr. Inskeep, Mr. Oakes and Mr. Moss went back and forth about the attendance policy, and there was some heat in the room. Mr. Oakes was pulled out of service, and when the meeting was over, he left Mr. Moss' office (Tr. 291, 304). According to Mr. Inskeep, Mr. Oakes was upset, and possibly raised the volume of his voice, but he was not yelling (Tr. 291). He and Mr. Oakes left the room, and Mr. Inskeep walked toward the crew room (Tr. 291).

Mr. Inskeep was supposed to work with Mr. Oakes that day. When Mr. Oakes was pulled out of service, Mr. Inskeep was sent home for the day. But first he had some paperwork to complete, including filling out a time sheet (Tr. 292). Mr. Inskeep stated that Mr. Oakes completed his paperwork in the crew room, and then left the building; they both went to walk out at the same time (Tr. 305). Mr. Wyatt put his head out the door and asked Mr. Oakes if he wanted to come back and sign off on the hearing investigation; Mr. Inskeep continued walking to the parking lot (Tr. 305).

He did not recall hearing Mr. Oakes use profanity, or call Mr. Wyatt a "f--ing trainmaster." Mr. Inskeep stated that he uses this word, and it was hard to think of anyone who did not, including managers. It was frequent and common. Mr. Inskeep never reported that he was offended, nor did he know of anyone else who had; he never heard anyone complain that there was too much cursing on the railroad (Tr. 293-294).²⁹

Mr. Wyatt testified that the first indication he had that Mr. Oakes needed to mark off was when he received an email from the customer service department that Mr. Oakes had called off. Mr. Wyatt stated that Mr. Oakes "mentioned" in his conversation with customer service that he would be off for an indefinite duration, and the email from customer service also "talked about" an indefinite duration (Tr. 469-470).³⁰ The customer service center advised Mr. Oakes that he needed to contact a supervisor; Mr. Oakes called him, and told him that he needed to mark off to go to the doctor. Shortly after that, Mr. Oakes came into the office to pick up his turkey that Mr. Murphy had bought for the crews for the holiday. Mr. Wyatt asked Mr. Oakes if he was going to Michigan City to the doctor; he presumed that he was, because this was Mr. Oakes' primary residence. Mr. Oakes responded that he was, and Mr. Wyatt asked him to advise them about the prognosis, and how long he would be off (Tr. 445-447, 470).³¹ He did not hear from Mr. Oakes, and did not talk to him until December 23. During that six day period, he had no idea when Mr. Oakes was coming back to work (Tr. 445-447).

During that time, train master Moss covered the assignments off the extra board. Mr.

²⁹ Mr. Inskeep stated that he did not recall hearing an employee on the railroad, including Mr. Oakes, call a supervisor a "f--ing trainmaster" (Tr. 313).

³⁰ Mr. Wyatt does not have this email, nor did he ever search for it (Tr. 470).

³¹ Mr. Wyatt acknowledged that at the investigation, he testified that he did not advise Mr. Oakes that he needed to mark off or report to work once every 24 hours (Tr. 471).

Moss checked with him to see if he had heard from Mr. Oakes. According to Mr. Wyatt, they were very short on personnel heading into the holiday and someone else had to work extra hours to cover (Tr. 448). However, he could not remember if the extra board was exhausted to cover Mr. Oakes' absence, nor did he recall any service interruption because of Mr. Oakes' absence (Tr. 473).

Mr. Wyatt recalled that Mr. Oakes came back on December 23, and Mr. Moss asked him to go into his office, where they conferred behind closed doors. Mr. Wyatt heard a very loud heated exchange from the office (Tr. 449). Mr. Moss asked him and Mr. Inskeep to join them, and they went into Mr. Moss' office and closed the door. They discussed the events of the day that Mr. Oakes marked off, and their conversation (Tr. 449, 473). Mr. Wyatt did not remember Mr. Moss's specific words to Mr. Oakes, but he recalled that Mr. Oakes wanted to ask him how long he had told him that he would be off. Mr. Wyatt did not have any idea how long Mr. Oakes intended to be off when he marked off (Tr. 449). Mr. Moss asked him again if he had had any contact with Mr. Oakes in the interim, but he had not. Mr. Moss advised Mr. Oakes that he was removing him from service pending a formal investigation regarding his absence (Tr. 449, 473).

Mr. Wyatt returned to his office, leaving Mr. Oakes and Mr. Moss in Mr. Moss' office. Mr. Oakes then left Mr. Moss' office, and Mr. Wyatt thought that he had left the property (Tr. 450). Mr. Moss brought him a formal charge letter that he had prepared, and that he and Mr. Oakes had signed to show that Mr. Moss gave him the notice of investigation for the charge. Mr. Moss asked him to make copies and distribute it, and send the charge letter out (Tr. 450). Mr. Wyatt then realized Mr. Oakes was still in the office. Knowing that Mr. Oakes had two addresses, Mr. Wyatt approached him in the crew room to ask him which address he should use (Tr. 450).

Mr. Wyatt approached Mr. Oakes, who was at the countertop area where employees store gear (Tr. 475). Mr. Oakes grabbed his personal belongings, and was heading for the door, or just at it, and said that he would get back to him (Tr. 450). As Mr. Oakes was turning away, going out the door, he sort of looked back at Mr. Wyatt and shouted back over his shoulder "I'm just talking to that f--ing train master" (Tr. 450, 475-476).³²

Mr. Wyatt realized that Mr. Oakes was talking on the phone, which he did not know when he first approached him (Tr. 450). According to Mr. Wyatt, Mr. Oakes was very agitated, loud, and angry. He left the building, and Mr. Wyatt returned to his office. Mr. Moss overheard from his office, and came out of his office and into Mr. Wyatt's office, and told him that he had heard the statements (Tr. 451, 479). He and Mr. Moss discussed whether Mr. Oakes' statement was an offense or violation of company rules, and determined that they were obligated to charge Mr. Oakes with a violation of a company rule. They asked Mr. Murphy for his opinion, and he concurred that it was an offense or violation. Mr. Wyatt prepared a charge letter notifying Mr. Oakes of a formal investigation (Tr. 451).

Ms. Combs was in the general manager's office; according to Mr. Wyatt, you could hear conversation in the building in all of the offices (Tr. 479). He learned that Ms. Combs had

³² At his deposition, Mr. Wyatt stated that Mr. Oakes was looking him in the face, and there was every appearance that the comment was directed to him (Tr. 478).

overheard the statement when she approached him and Mr. Moss later that day, although he did not recall the substance of their conversation (Tr. 480).³³ Mr. Wyatt did not recall if Mr. Inskeep was in earshot, although he was there earlier (Tr. 481). He acknowledged that at the investigation, he testified that Mr. Inskeep was in earshot and in a position to have overheard the conversation (Tr. 481). At his deposition, Mr. Wyatt testified that Mr. Oakes' engineer would have been there; he did not recall who that was, but he was fairly certain there was a yard conductor in the office; this would have been Mr. Inskeep (Tr. 482). Mr. Wyatt acknowledged that in his deposition, he testified that he believed Mr. Inskeep would have heard Mr. Oakes' comment, and that he was in the office; Mr. Inskeep was the only person he remembered specifically, and he was close enough to hear the language (Tr. 483).

Mr. Murphy testified that he thought the attendance policy at CF&E was pretty lax, and he knew that attendance issues were always a problem.³⁴ He wanted to get a grasp of how they were on a short line (Tr. 498). He stated that on a short line, they could run short of crews if someone marked off and there was no one available to protect the assignment, while on a large Class 1 railroad, there was a pretty big pool of employees (Tr. 498). He found out quickly that on a short line, with only 24 to 28 employees, they did not have that luxury. Customers are a big concern, and it was important to take care of them to bring in revenue. Attendance was a lot more critical at CF&E than at Norfolk Southern (Tr. 498).

Mr. Murphy stated that Mr. Moss would have brought Mr. Oakes' attendance issue to him, gone over it, and explained the policy; he remembers having such a discussion.³⁵ Mr. Moss told him that Mr. Oakes marked off and violated RailAmerica policy by not calling in appropriately. Mr. Murphy stated that at the time, he was just getting to learn the policy, which was pretty much the same as Norfolk Southern (Tr. 499).

According to Mr. Murphy, he had a question that he wanted to address about job abandonment; he was not sure if this was what they were looking at, or if it was just a failure to follow guidelines. He asked Mr. Moss to remove Mr. Oakes from service pending an investigation, and they would then determine if it was an abandonment, or a violation of the calling in policy (Tr. 500).

Mr. Murphy stated that he did not feel that it was prejudging to ask Mr. Moss to remove Mr. Oakes from service pending an investigation, unlike with Mr. Furge, because it was a different circumstance. Mr. Oakes was very angry, and Mr. Murphy could not afford to let him go out and work in that condition. He acknowledged, however, that Mr. Moss pulled Mr. Oakes out of service before the alleged vulgarity was uttered (Tr. 541-542).

³³ At his deposition, Mr. Wyatt first stated that Ms. Combs heard the conversation in her office, and then stated that she did not, because she was not there (Tr. 480).

³⁴ Although he stated that attendance was a very important part of his job as a supervisor, Mr. Wyatt acknowledged that he was not really sure that enforcement was lax at CF&E; he was trying to get an understanding of short line attendance conditions as opposed to class 1 conditions. He did not know what the enforcement of the attendance policy was before he got there, nor did he give any training to employees about how he interpreted the policies or planned to enforce them (Tr. 535-536). Nor was there any talk about tightening up rule compliance when he was brought on (Tr. 525).

³⁵ It is difficult to understand why Mr. Moss would be explaining a "policy" that up to that point, had never been observed.

Mr. Murphy stated that he believed he was in the office on December 23, 2008, when Mr. Oakes returned, but he did not hear any of the activities. He stated that his hearing is very bad, 40% in his left ear, and 70% in his right (Tr. 501). Mr. Murphy was not sure what he was doing; he may have been on the phone. He did not overhear any conversation where Mr. Oakes used a vulgarity (Tr. 551-552). Mr. Murphy testified that Mr. Moss came into his office and told him what happened, and “at some point,” Mr. Wyatt told him what had happened, and the language that was used. They told Mr. Murphy that Mr. Oakes was very belligerent, upset, and angry (Tr. 501). Mr. Moss had told Mr. Oakes that he was pulling him out of service, and he got very upset (Tr. 501). Mr. Wyatt told Mr. Murphy that Mr. Oakes used a disparaging remark toward him, and Mr. Murphy wanted an investigation for that type of language (Tr. 501).³⁶

Mr. Murphy stated that he wanted to think about it, and not rush into anything. In all of his years at Norfolk Southern, he could not think of anyone ever telling an officer something like that. He made the determination that it was an irresponsible and malicious comment made not only toward an employee, but also a supervisor. It undermined authority and could not be tolerated (Tr. 502).

According to Mr. Furge, employees at CF&E used vulgarity joking around with each other, and every once in a while if they were mad. He felt that he probably heard vulgarities every day with everybody (Tr. 359). He described an incident in August 2008, when he had just finished training with Mr. Moss, when a customer called and wanted to switch cars around. Some of the cars were already out on the track. According to Mr. Furge, Mr. Moss said “F--- her, she’ll get her cars when she gets them (Tr. 359-360). Mr. Wyatt stated that he has heard managers at CF&E use the “F” word (Tr. 485).

The investigation was done by Mr. Ryan Ratledge, the general manager of a sister railroad, who Mr. Murphy believed had experience in conducting investigations (Tr. 503). Mr. Murphy read the transcript of the two investigations, one for attendance, and one for conduct unbecoming. Mr. Murphy felt that with respect to the attendance issue, this was something that Mr. Oakes merely neglected to see or understand in the handbook. He concluded that Mr. Oakes violated the attendance policy (Tr. 504). Because Mr. Oakes had received seven days for a minor offense previously, Mr. Murphy went to the next step, which was 14 days suspension (Tr. 504). Mr. Murphy stated that the attendance policy is important, because it makes sure that customers are taken care of if there are not available personnel. It also makes sure they know if an employee had a health problem, and they need to notify the medical department (Tr. 507).

Mr. Murphy did not feel that there was any question about Mr. Oakes’ conduct with respect to the alleged vulgar language, because two officers heard him say it (Tr. 507). He stated that it would cause a disruption in discipline if people were allowed to talk that way, and a breakdown in responsibilities and professionalism. If there was such a breakdown in discipline, there could also be a breakdown in discipline as far as throwing switches, putting handbrakes on a car securing equipment, or stopping for red signals. It would have implications for his ability to supervisor. If Mr. Murphy had two train masters who said that it what Mr. Oakes said to me,

³⁶ Mr. Murphy stated that he shared an office with Ms. Combs, who was maybe ten feet from him; she did not say anything to him about the alleged vulgarity (Tr. 551-552).

and he let it go, he was not being professional about running the railroad. Mr. Murphy was new, and he wanted to make sure CF&E was a rule compliant railroad, and there would be no misunderstanding about how rule violations would be handled (Tr. 508-509).³⁷

In making his decision to terminate Mr. Oakes, Mr. Murphy relied on the investigation transcripts, as he had no personal knowledge of the incidents (Tr. 535). Mr. Murphy testified that he had no reason to question the fairness or impartiality of the investigation, despite the fact that Mr. Ratledge cut off questioning by Mr. Oakes and the union representative. Nor did Mr. Oakes' claim that he tried to call a number of witnesses cause him concern (Tr. 544). His recollection of the transcript is that there was a lot of anger involved (Tr. 545).

Mr. Murphy decided that Mr. Oakes would be discharged, because he used conduct unbecoming an employee, and according to Railamerica policy, that is a serious event that can lead to dismissal (Tr. 510). Mr. Murphy stated that he did not need to take into account Mr. Oakes' previous incidents of discipline, because he determined that this was a very serious violation (Tr. 556). Although he previously testified that he did not take Mr. Oakes' background into account in making the decision to terminate him, at the hearing he stated that he may have considered Mr. Oakes' background, but he did not recall (Tr. 557). Nor did he take Mr. Oakes' job performance into consideration, or tell anyone else at CF&E that his job performance was the reason he decided to terminate Mr. Oakes (Tr. 561).

Mr. Oakes and the union appealed his dismissal to the Public Law Board, but upheld the dismissal, and returned Mr. Oakes to work under the condition that it was his last chance. He did not receive back pay. The Board reduced the 14 days suspension to 7 days, and instructed CF&E to pay Mr. Oakes for the difference. Mr. Murphy sent Mr. Oakes a check for seven days' pay, and instructions on how to contact them for reinstatement, but Mr. Oakes did not respond. Mr. Murphy understands that Mr. Oakes is no longer interested in employment with CF&E (Tr. 510-512).

Mr. Murphy testified that he may have discussed the decision to terminate Mr. Oakes with someone else, but he did not recall. He was not aware that Mr. Ovitt, a regional vice president and his boss, testified that an employee could not be terminated unless Mr. Murphy talked with him first. He stated that no one ever told him about such a policy; he did not remember talking with Mr. Ovitt, although he may have (Tr. 553).³⁸

Ms. Combs' first day of work was on December 23, 2008, and she was just getting oriented (Tr. 396).³⁹ She stated that she got to work between 7:45 and 8:00; there was a

³⁷ Mr. Murphy stated that he had never witnessed swearing at a direct supervisor at Norfolk Southern. There was one other employee who had problems with hostile and malicious actions at CF&E, but not cussing; he was dismissed (Tr. 509).

³⁸ Mr. Murphy was not surprised that Mr. Ovitt testified that he did not recall a specific conversation with Mr. Murphy about his review of the investigation transcript, but Mr. Ovitt would have to believe it happened because nobody should have terminated any employee without his approval or review of the situation (Tr. 555, CX 64). But he still did not recall speaking with Mr. Ovitt.

³⁹ Although Ms. Combs testified at her deposition that she met Mr. Oakes during an office meeting in December 2008, she testified at the hearing that she had met a lot of people, and could not specifically say that she had met Mr. Oakes (Tr. 399).

discussion in the train master's office (Tr. 400).⁴⁰ This discussion broke up, and there was then a pretty heated “elevated” discussion, with some “vulgarity” being shouted in the crew room (Tr. 400). Ms. Combs did not know what happened in Mr. Moss' office; she heard the commotion when it moved to the crew room (Tr. 401). Ms. Combs’ office door opened up into the hallway outside the crew room. She stated that the conversation, which involved Mr. Wyatt and another person, was right outside her office door and to the left; they were not in her field of vision (Tr. 402). At her deposition, Ms. Combs testified that this discussion involved Mr. Oakes, Mr. Moss, and Mr. Wyatt, but at the hearing, she recalled hearing only two voices, Mr. Wyatt and an unidentified person (Tr. 403, 405-406). She thought that there were three people in the crew room, because the conversation in the hallway before the discussion in Mr. Moss’s office involved three people (Tr. 405).

Ms. Combs looked to her doorway, which was to the left, and saw three people walk by. She did not remember the word she heard, she just knows that it was vulgar; she stated that it typically did not occur in a work environment, so you would remember it (Tr. 407). Ms. Combs stated that she has heard others at CF&E use vulgarity outside the office, but not generally inside the office building (Tr. 407).

Ms. Combs stayed at her desk; she did not talk to any managers about what she heard. The first time she told anyone about this incident was two weeks before the hearing, at her deposition, which was three years and three months after it happened (Tr. 408).

Ms. Combs testified that the conversation made an impression on her, because she had just started her job, and was trying to decide if this was the right environment; it made her question whether she wanted to work there (Tr. 411).

After he received the notice, Mr. Oakes left the office and returned to his Ft. Wayne home (Tr. 145). He received a second investigation notice dated December 29, 2008 (Tr. 149, CX 18). Before the investigation took place, Mr. Oakes called the alert line listed in the Rail America handbook, and spoke with someone who gave him a number assigned to his case. He identified Complainant's Exhibit 19, dated December 30, 2008, the harassment charge he filed with the alert line, in care of Ms. Crawford with human resources. He did not receive a response on this claim (Tr. 150-151).

The investigation was held on January 8, 2009. There were two separate charges, for the attendance violation, and for the conduct charge (Tr. 154-155). Mr. Oakes, through Mr. Hill, the union representative, had requested witnesses, all of whom were employees of CF&E, in writing. Mr. Oakes stated that not all of them were made available, but he did not know why; he had one witness at the investigation for each charge (Tr. 155-156).

Mr. Oakes stated that at the investigation, CF&E brought in the Rail America policy handbook, and claimed that he was required to call in after 36 hours, every day he was out (Tr. 158). According to Mr. Oakes, he and Mr. Hill felt that Mr. Wyatt was also in direct violation of the policy, as he was a supervisor of a relative who worked for CF&E. Mr. Oakes and Mr. Hill wanted to show how the policy and handbook were not so important as to require dismissal, and

⁴⁰ Ms. Combs did not remember what time of day she overheard this discussion (Tr. 401).

to point out the inconsistency of the policy (Tr. 160).

Mr. Oakes identified a CF&E general notice, under the general manager's signature, regarding attendance (RX 3). This notice was posted on June 6, 2008, and he thought that he probably saw it at about that time. He stated that employees were required to check the bulletin every morning. Mr. Oakes stated that this notice, which would have been in both the Ft. Wayne and Warsaw yard offices, was the attendance policy, which established the procedure for taking personal leave and time off. Under this policy, employees did not have to call in. He knew of nobody who had been required to call in on a 36 hour leave, or daily (Tr. 162, 163).⁴¹

Mr. Oakes noted that the handbook (CX 29) stated that employees who know in advance that they will be absent for health reasons must give supervisors advance notice, including the probable start date and the duration of the absence. He gave a start date of December 18, and stated that he would be off indefinitely, as he was ill, and going to his doctor (Tr. 165-166).

Mr. Oakes also noted that part of the handbook says that management must provide fair and consistent treatment, using coaching and training. He never received any coaching or training on the attendance policy. Nor did he receive a phone call from any train master between December 18 and 20 asking him why he had not called in. He received no coaching or training about the alleged offensive language he used, nor did anyone confront him on the day he allegedly used it. The first Mr. Oakes heard of this allegation was when he received the second investigation notice (Tr. 164).

After the investigation, Mr. Oakes received a notice of discipline on January 16, 2009, with a 14 day suspension for an attendance violation (Tr. 159, CX 25). On January 17, 2009, he received a notice of discipline for the conduct charge, dismissing him (Tr. 159, CX 26).

After his dismissal, Mr. Oakes immediately began applying for any job that came up on the railroad website job listings (Tr. 194). His first offer was from the Bloomer Line in Gibson City, as an engineer, where he began working on September 14, 2009 (Tr. 169, 195). Mr. Oakes had to move to Gibson city, and he rented his house in Ft. Wayne (Tr. 174).

Mr. Oakes stated that this was his second dismissal. He had moved to Ft. Wayne for the job with the Respondent, and he had to move again for the job with the Bloomer Line (Tr. 196). Mr. Oakes did not believe that he would get another railroad job; he thought his career was ended, and after 28 years in the railroad industry he would not make it to retirement. Every application asked if he was ever charged with a violation, and he felt like he had to disclose that (Tr. 196-197). Mr. Oakes had friends in the industry who were able to find him a job (Tr. 197). He stated that he feels good about the people he works with, and thinks it is a good opportunity; he is proceeding to retirement (Tr. 197-198).

However, Mr. Oakes misses his family, and he is no longer engaged, due in part to his being fired for a second time (Tr. 199). He did not move back to Ft. Wayne from Gibson City

⁴¹ Mr. Oakes acknowledged that he received the railroad employee handbook when he was hired, including the rules about attendance, which state that an employee must call in every day unless otherwise advised by a supervisor, and that a failure to report an absence in 36 hours will be considered job abandonment (Tr. 217).

after the Public Law Board reinstated him, because the Board put a last chance warning in his record, and he did not feel it was safe to quit the job he had to come back and work for the Respondent, in light of past management practices (Tr. 179).

DISCUSSION

Election of Remedies

The Respondent repeats its earlier argument that Mr. Oakes' claims must be dismissed pursuant to the election of remedies provision at 49 U.S.C. § 20109(f). In my December 6, 2011 Decision and Order Denying Respondent's Motion for Summary Judgment, which I incorporate by reference, I addressed the Respondent's arguments at length, and found that the Respondent failed to show as a matter of law that Mr. Oakes sought protection under "another provision of law" for the allegedly unlawful act of the Respondent at issue in the instant proceeding. The Respondent has not presented any authority or argument that persuades me otherwise.

Limitation of Jurisdiction

The Respondent also argues that the Department of Labor lacks jurisdiction to decide the issues of whether Mr. Oakes' conduct violated its attendance policy, whether he directed vulgar language at his supervisor, whether the level of discipline assessed against him was excessive, and "similar concerns" governed by the collective bargaining agreement (Respondent's Brief at 9-10). According to the Respondent,

[t]he law is well settled that the mandatory arbitral remedies established by the Railway Labor Act are exclusive, final and binding. The issue over which the Department of Labor has jurisdiction in this case is limited to determining the motivation of the CFER's decision maker in taking disciplinary action.

Id. Not only is the Respondent's argument an attempt to restate its unsuccessful election of remedies argument, it misstates the import of the cases it relies on. Thus, the Respondent claims that "The Supreme Court has plainly delineated the exclusive jurisdiction of the Adjustment Boards from the jurisdiction of tribunals like this one resolving asserted claims of whistleblowers." Respondent's Brief at 10. In fact, in the case cited by the Respondent, the Supreme Court made it clear that

. . . *Lingle* provides an appropriate framework for addressing RLA pre-emption, and its standard – that the existence of a potential CBA-based remedy does not deprive an employee of independent remedies available under state law – is adopted to resolve such claims.

Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246 (1994), citing to *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988). In that case, the Court noted that the question was

whether an aircraft mechanic who claims that he was discharged for refusing to certify the safety of a plane that he considered unsafe and for reporting his safety concerns to the

Federal Aviation Administration may pursue available state-law remedies for wrongful discharge, or whether he may seek redress only through the RLA's arbitral mechanism. We hold that the RLA does not pre-empt his state-law causes of action.

Id. at 248. The Court noted that no proposed interpretation of the RLA or its legislative history demonstrated "a clear and manifest congressional purpose to create a regime that broadly pre-empts substantive protections extended by the States, independent of any negotiated labor agreement." *Id.* at 255, 256.

Central to a determination on Mr. Oakes' claim is a finding of whether his reporting of safety concerns, that is, his protected activity, was a contributing factor in the Respondent's decision to suspend him for violation of the attendance policy, and to terminate his employment for unbecoming conduct. In other words, the Respondent is correct that this involves an assessment of the motives of the supervisors who made that decision.

But nothing that is to be determined in this claim requires or even implicates the interpretation of the collective bargaining agreement, or an assessment of whether the remedies assessed by the Public Law Board were appropriate.⁴² In fact, whether Mr. Oakes' failure to call in every day he was out sick did or did not violate the attendance policy is wholly irrelevant to his claim in this case. Rather, the issue is whether the Respondent's selective enforcement of this policy tends to show that its suspension of Mr. Oakes was based, at least in part, on his protected activity.

Similarly, the determination of whether Mr. Oakes' protected activity was a contributing factor in the Respondent's decision to terminate him turns on the resolution of purely factual questions, including the question of whether Mr. Oakes' actually uttered the words claimed by the Respondent. Again, nothing in this determination requires that I interpret the collective bargaining agreement.

Nor, as the Respondent implies, is the finding by the Public Law Board, that Mr. Oakes did utter those words and thus violated the Respondent's rules governing employee conduct, binding on me. I am not, as suggested by the Respondent, "reviewing" the determinations by the Public Law Board that Mr. Oakes violated the Respondent's attendance policy and rules governing employee conduct. Indeed, the case cited by the Respondent is exactly on point on this issue. As the Supreme Court noted, in *Lingle v. Norge Div. of Magic Chef, Inc., supra*,

an employee covered by a labor agreement was fired for filing an allegedly false worker's compensation claim. After filing a grievance pursuant to her CBA, which protected employees against discharge except for "proper" or "just" cause, she filed a complaint in state court, alleging that she had been discharged for exercising her rights under Illinois worker's compensation laws. The state court had held her state-law claim pre-empted because "the same analysis of the facts" was required in both the grievance proceeding and the state-court action.

Hawaiian Airlines, Inc. v. Norris, supra, at 261. The Supreme Court reversed, recognizing that

⁴² Indeed, this would be difficult, as the collective bargaining agreement is not in evidence.

where the resolution of a state law claim depends on interpretation of the collective bargaining agreement, it is pre-empted. But “‘purely factual questions’ about an employee’s **conduct** or an employee’s **conduct** and motives do not ‘requir[e] a court to interpret any term of a collective-bargaining agreement. *Id.* at 261, 262, citing to *Lingle, supra*, 486 U.S. at 407. [emphasis added.]

The Supreme Court acknowledged that the state law analysis could well involve attention to the same factual considerations as the contractual determination of whether the claimant was discharged for just cause, but “even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is ‘independent’ of the agreement for § 301 pre-emption purposes.” *Hawaiian Airlines, Inc. v. Norris, supra*, at 262, citing *Lingle, supra*, 486 U.S. 408-410.

In this case, the determination on Mr. Oakes’ whistleblower claim requires the resolution of factual issues that do not even remotely implicate interpretation or application of a collective bargaining agreement. Mr. Oakes’ claims under the whistleblower provisions of the FRSA are independent of any claims under the collective bargaining agreement, and the RLA does not pre-empt this claim. Nor is this Court bound by any factual determinations made in connection with Mr. Oakes’ proceedings under the RLA.

APPLICABLE LAW

The Act incorporates by reference the procedures and burdens of proof for claims brought under the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century (“AIR 21”), 49 U.S.C. Section 42121 (2011). AIR 21, and thus the RSA, requires a complainant to prove by a preponderance of the evidence that: (1) he or she engaged in protected activity or conduct; (2) the employer knew of the protected activity; (3) the complainant suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. A complainant who meets this burden is entitled to relief unless the employer can establish, by clear and convincing evidence, that it would have taken the same adverse action absent the protected activity. *See* 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. Section 1979.109(a); *Hafer v. United Airlines, Inc.*, ARB No. 06-017 (Jan. 31, 2008), slip op. at 4;; *Clemmons v. Ameristar Airways, Inc., et al*, ARB No. 05-048, ALJ No. 2004-AIR-11, slip opinion at 3 (ARB June 29, 2007); *Barker v. Ameristar Airways, Inc.*, ARB No. 05-058 (Dec. 31, 2007), slip op. at 5.

The term “demonstrate,” as used in AIR 21, and thus in the FRSA, means to “prove by a preponderance of the evidence.” *See Peck v. Safe Air Int’l, Inc.*, ARB No. 02-028, ALJ No. 01-AIR-3, slip op. at 9 (ARB Jan. 30, 2004). Thus, Mr. Oakes bears the burden of proving his case by a preponderance of the evidence. If Mr. Oakes establishes that the Respondent violated the FRSA, the Respondent may avoid liability only if it can prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of Mr. Oakes’ protected behavior.

ISSUES

The Respondent has agreed that it is a “railroad carrier” within the meaning of 49 U.S.C. §§ 20102 and 20109. Thus, the Respondent is responsible for compliance with the employee protection provisions of the FRSA. The Respondent also agrees that Mr. Oakes was an “employee” within the meaning of 49 U.S.C. § 20109, and thus Mr. Oakes enjoys the protections of the FRSA.

The issues to be decided are:

1. Whether Mr. Oakes engaged in protected activity.
2. Whether the Respondent had knowledge of Mr. Oakes’ protected activity.
3. Whether Mr. Oakes suffered an adverse action.
4. Whether Mr. Oakes’ protected activity was a contributing factor in the adverse action.
5. If so, whether the Respondent has established that it would have taken the adverse action regardless of the protected activity.

Protected Activity

The FRSA defines protected activities to include acts done to report conduct that the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security, or reporting in good faith a hazardous safety or security condition. In this case, I find that the evidence overwhelmingly establishes that Mr. Oakes engaged in protected activities when he reported his safety concerns to his supervisors, both verbally and through the Unsafe Condition Report and time claim processes.

Mr. Oakes testified that he made numerous verbal complaints to his supervisors about unsafe conditions before he submitted his first written report in April 2008. After CF&E did not act on or otherwise respond to his complaints, Mr. Oakes began putting his complaints in writing. He made his first written report in April 2008, in connection with unsafe track conditions, including defects in switches and ties. Mr. Oakes continued to raise concerns about these issues with his supervisors between April and June 2008.

Mr. Oakes also reported ongoing problems with insufficient seating on the engines. Specifically, he described an incident on September 29, 2008, when he and Mr. Wolfersheim were assigned to work with a student, and were instructed to use an engine with only two seats. Mr. Oakes told his supervisor, Mr. Wyatt, that he did not think this was a safe practice, but Mr. Wyatt told him to take the engine anyway.

Mr. Wolfersheim confirmed this incident, recalling that Mr. Oakes was concerned, and that he raised questions with Mr. Wyatt, the trainmaster. Mr. Wolfersheim heard Mr. Oakes ask Mr. Wyatt for another locomotive or a seat, and Mr. Wyatt respond that it was all they had that day. Mr. Wyatt stated that they needed to just put up with it. Neither Mr. Wolfersheim nor Mr. Oakes felt that it was right to make the trip with insufficient seats.

Mr. Wyatt did not directly address what happened on that day. He testified that as a trainmaster, if there was a student assigned, and not enough seats, or a second unit, the student would have to be reassigned. He claimed that he did not "personally" direct Mr. Oakes and Mr.

Wolfersheim to take a locomotive with three people and two seats, and while it was possible that the train operated with three people in the locomotive, he did not tell them to do that.⁴³

I credit the testimony of Mr. Oakes and Mr. Wolfersheim over that of Mr. Wyatt, which reflects that both Mr. Oakes and Mr. Wolfersheim were concerned about being assigned to use a locomotive with inadequate seating, and Mr. Oakes raised this issue with the trainmaster, Mr. Wyatt. I find that, despite their objections, they were instructed by Mr. Wyatt to use a locomotive with inadequate seating. I also credit the testimony of Mr. Oakes and Mr. Wolfersheim, that operating a locomotive with insufficient seating is hazardous, or as Mr. Wolfersheim described it, similar to riding in a car without a seatbelt.

Mr. Oakes put his concerns in writing, in the form of a written grievance, or time claim, in which he alleged that the engine was unsafe and not in compliance with safety regulations. Mr. Wolfersheim also signed this time claim. But Mr. Oakes received no response, and a few weeks later he sent his time claim to Mr. Moss by certified letter.

But not only did Mr. Moss deny Mr. Oakes' claim, he sent him the results of an efficiency test allegedly performed on September 29, 2008, the date that Mr. Oakes and Mr. Wolfersheim were instructed to take the locomotive with insufficient seating.⁴⁴ He was also charged with violation of the conductor authority rule.

Mr. Oakes then sent letters to Mr. Murphy, Mr. Moss, and Mr. Grucher, the corporate safety officer, protesting the efficiency test, and again raising his concerns about inadequate seating. With respect to Mr. Grucher, Mr. Oakes attached documents from Mr. Wolfersheim showing that seating on the same engine had been written up numerous times before. Mr. Oakes never received any response.

It is not entirely clear why the Respondent argues that the submission of this time claim is not protected activity, other than its claim that Mr. Oakes was motivated by financial gain, not safety concerns. The Respondent does not dispute that this is an unsafe practice. Nor is Mr. Oakes required to make his safety complaint in any particular fashion or on any particular form. Indeed, Mr. Wolfersheim testified that the time claims and the Unsafe Condition Reports went to the same people. I credit Mr. Oakes' testimony that his primary concern was to document his safety complaint. But even if he were also motivated by the prospect of a few more hours of pay, that does not preclude a legitimate concern over safety.

Nor do I give any credence to the Respondent's argument that filing the time claim was not protected activity because Mr. Oakes himself created the unsafe condition by taking out a locomotive with insufficient seating. Respondent's Response at 4. As discussed above, I find that Mr. Oakes and Mr. Wolfersheim were specifically instructed by Mr. Moss and Mr. Wyatt, their supervisors, to take a locomotive with insufficient seating. Mr. Oakes made his objections

⁴³ Mr. Wyatt may be technically correct, in that Mr. Moss, his supervisor, gave the instructions, and Mr. Wyatt confirmed them. It is a difference without a distinction, which detracts from the credibility of Mr. Wyatt's testimony.

⁴⁴ It is telling that Mr. Wolfersheim, who also signed off on the time claim, but did not persist after the claim was ignored, was not charged with failure of an efficiency test, or any other rules, in connection with this incident.

clear to Mr. Wyatt, but was instructed to take the locomotive anyway, with the consolation that they would have a locomotive with adequate seating for the return trip. Mr. Oakes did not create this unsafe condition; Mr. Moss and Mr. Wyatt did.

The Respondent also argues that Mr. Oakes' claim of insufficient seating lost any character as a reasonable safety complaint by virtue of the fact that the Respondent has created a mechanical department on the property. Respondent's Response at 5. Unfortunately for the Respondent, there is not a shred of evidence in the record to suggest that it no longer has problems with insufficient seating on locomotives, despite the presence of an on-site mechanical department. If this issue had been resolved, certainly no one advised Mr. Oakes in response to his repeated submission of his claim.

Mr. Oakes submitted an Unsafe Condition Report on November 5, 2008, setting out problems with crossovers and a gap in the rails. Mr. Furge testified that this was one of the reports he discussed in his meeting with Mr. Murphy in November 2008.

Mr. Oakes also submitted an Unsafe Condition Report in connection with his assignment to ride on the lead end of a "shove" move on November 6, 2008. There is no dispute that Mr. Oakes and Mr. Inskeep were assigned to this job, which required them to shove the cars for their customer Omni backwards for thirteen miles and onto Omni's stub track, instead of taking the longer route, which would have allowed them to turn around, and back the cars onto the Omni track.

Mr. Oakes testified that he had already had discussions with Mr. Moss about the fact that he felt this move was unsafe. Mr. Oakes testified that as the conductor, he would be riding in a scrap gondola, standing on stirrup straps and holding onto handgrips. With stops for breaks, it would take one to two hours. He questioned this move because of the numerous road crossings and towns the train would go through - there was no way for him to stop traffic, and he did not have a whistle to let people know he was coming.

The Respondent's attempt to downplay the legitimacy of Mr. Oakes' safety concerns is unpersuasive.⁴⁵ I find that it was eminently reasonable for Mr. Oakes to question the safety of a procedure that would require him to hang on a ladder at the lead end of a scrap gondola car for thirteen miles, without a whistle, or a means to stop traffic at crossing. I note that Mr. Inskeep, who was working with Mr. Oakes that day, and had done this shove before as the engineer, sitting in the locomotive, personally did not have concerns. But he also testified that he would defer to the conductor performing and riding on the point, if he had safety concerns.

Mr. Oakes tried to contact Mr. Moss, and also called Mr. Wyatt to tell him about his concerns over the work instructions; he told Mr. Wyatt that he did not feel comfortable with the

⁴⁵ The Respondent cites to 49 C.F.R. § 218.99, which sets out the procedures to be followed during a shove move, arguing that a shove move is "sanctioned" by the FRA. Its claim that a finding that Mr. Oakes' safety concerns were legitimate would overrule the FRA and overturn 100 years of railroad operating practices is illogical and overblown, to say the least. Respondent's Brief at 17. The existence of rules governing the performance of a shove move does not preclude legitimate safety concerns about whether a particular move is safe. Nor has the Respondent claimed that this particular shove move would have been in compliance with these regulations.

move, although he was willing to do it with a caboose or shoving platform, where he could stand, and provide whistle protection. Mr. Wyatt told Mr. Oakes that the instructions were correct.

Mr. Inskeep confirmed that Mr. Wyatt told them the shove needed to be done. Mr. Wyatt also confirmed that he did not contradict Mr. Moss's instructions, and the shove was what Mr. Oakes was expected to do.⁴⁶ Mr. Wyatt testified that he had previous experience with shove moves at Norfolk Southern, where they used gondolas, or a caboose with a shoving platform; all of these cars had whistle control, and frequently a brake.

But this was not what Mr. Oakes was asked to do. Indeed, Mr. Oakes acknowledged that if he were asked to take a different type of car, such as a shoving platform or caboose with a way to stop the train and a whistle signal, and a place to stand, he might have done it. But Mr. Wyatt told him that they were a short line, and they did not have a caboose.

In addition to raising his safety concerns about the assignment verbally with Mr. Wyatt, Mr. Oakes submitted an Unsafe Condition Report, dated November 6, 2008. Mr. Furge confirmed that Mr. Oakes contacted him about this incident, and that he prepared and submitted the Unsafe Condition Report.

The Respondent suggests that Mr. Oakes did not in fact submit an Unsafe Condition Report, and that he has fabricated his claim that he did so, pointing to the fact that this Report is not included in its Exhibit 11. However, I find that Respondent's Exhibit 11 is far from a comprehensive compilation of Unsafe Condition Reports filed at CF&E in 2008, and is completely unreliable as an indicator of whether a particular report was or was not filed.

There does not appear to have been a systematic method for handling and filing these reports; indeed, the handling and retention of these reports appears to have been haphazard at best.⁴⁷ Thus, Mr. Furge, who submitted numerous Unsafe Condition Reports himself, and also on behalf of others, identified numerous safety reports from 2008, of which he kept copies, but which did not appear in Respondent's Exhibit 11. He also testified about his safety briefing with Mr. Murphy in November 2008, where he specifically discussed Unsafe Condition Reports, including two from Mr. Oakes.

Mr. Murphy's recollection of this meeting with Mr. Furge was vague, nor did he recall seeing any Unsafe Condition Reports filed by Mr. Oakes, although he acknowledged that this would not be unusual, because the reports could go to a variety of people.

Ms. Combs, who was charged with organizing this system sometime in early 2009, after Mr. Oakes filed his whistleblower claim, attempted to gather all Unsafe Condition Reports filed in 2008. She stated that she did not find any filed by Mr. Oakes, but she could not say that the reports she gathered were the only ones received by CF&E in 2008.

⁴⁶ Mr. Wyatt's claim that this move had not been performed before at CF&E is contradicted by Mr. Inskeep, who testified that he had participated in the move a number of times.

⁴⁷ Apparently the Respondent would have the Court believe that **NO** Unsafe Condition reports were filed in January, February, March, April, May, September, October, or November of 2008.

I credit the testimony of Mr. Oakes and Mr. Furge, and find that, not only did Mr. Oakes verbally report his concerns about the safety of the procedure he was instructed to use to service a customer, he submitted an Unsafe Condition Report documenting those concerns.

The Respondent argues that Mr. Oakes fabricated his claim of protected activity by creating the Unsafe Condition Reports after he was removed from service. Respondent's Brief at 19. The Respondent bases this claim on the fact that Mr. Oakes did not "retain" fax receipts or other documentation to show that the reports were in fact received by the Respondent. Of course, it would have been difficult for Mr. Oakes to "retain" a fax receipt when he did not get one to begin with; both Mr. Oakes and Mr. Furge stated that the Warsaw yard office fax machine did not provide receipts.

The Respondent also argues that Mr. Oakes knew how to document a transmission by certified mail when financial gain was involved, as evidenced by his follow up transmission of his time claim, apparently suggesting that if his Unsafe Condition Reports were legitimate, and not fabricated, there would be some direct evidence of their receipt, such as a certified mail receipt. This convoluted logic does not compute. Mr. Oakes followed the Respondent's procedure, using the Respondent's forms, and the Respondent's equipment.⁴⁸ That he did not submit his Reports by certified mail does not even begin to suggest that he fabricated these reports.⁴⁹

I find that Mr. Oakes has established by an overwhelming preponderance of the evidence that he engaged in protected activity when he made verbal reports regarding his safety concerns, when he submitted and followed up on his April 2008 time claim, when he submitted his November 5, 2008 Unsafe Condition Report regarding problems with switches and a gap in the tracks, and when he submitted his November 6, 2008 Unsafe Condition Report in connection with his assignment to ride unprotected on the lead of a shove to CF&E's customer Omni.

Knowledge of Protected Activity

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

I find that Mr. Oakes has established that his supervisors, specifically Mr. Wyatt, Mr. Moss, and Mr. Murphy, the decision makers who determined that he should be suspended and that his employment should be terminated, were aware of his protected activities. In this regard, I accord full credit to the testimony of Mr. Oakes, whom I found to be a thoroughly credible

⁴⁸ I note that Mr. Oakes did not submit his original time claim by certified mail; he did so only when he received no response from management.

⁴⁹ The Respondent also argues that the fact that Mr. Oakes, "unlike other employees," received no response to his Unsafe Condition Reports indicates that these Reports were fabricated. However, the evidence clearly establishes that Unsafe Condition Reports were not always addressed or responded to.

witness. I had the opportunity to observe Mr. Oakes at the hearing, and I found his testimony to be credible and consistent, and corroborated by the documentary evidence as well as the testimony of other witnesses. In contrast, I found the testimony of Mr. Wyatt and Murphy to be adversely affected by their selective failure of recollection with respect to Mr. Oakes' numerous reports of safety concerns.

Mr. Murphy's recollection of his first meeting with Mr. Oakes, shortly after Mr. Oakes submitted his Unsafe Condition Report in connection with the shove move to Omni, is illuminating. It was also shortly after Mr. Furge met with Mr. Murphy to discuss outstanding Unsafe Condition Reports, including at least two that had been submitted by Mr. Oakes (but which are missing from Respondent's Exhibit 11). Mr. Murphy had also received Mr. Oakes' October 11, 2008 and October 30, 2008 letters regarding the insufficient seating issue. CX 4, 5, 7.

Mr. Murphy was the new boss. It strains credulity to accept his claim that he had heard "generally" that Mr. Oakes was a complainer, and that he intended his comment on his first meeting with Mr. Oakes to be a compliment. Rather, I find that it is a much more reasonable inference that when Mr. Murphy first met Mr. Oakes, he was aware that Mr. Oakes had outstanding Unsafe Condition Reports, as well as a disputed time claim,⁵⁰ and that his comment was intended to let Mr. Oakes know that he was on Mr. Murphy's radar, and that Mr. Murphy intended to keep his eye on him. If nothing else, it confirms that Mr. Murphy was aware of Mr. Oakes' safety "complaints."

The Respondent's reliance on its Exhibit 11 is misplaced. This document purports to be a list of all of the Reports submitted by employees to the Respondent in 2008. The apparent purpose of this document is to suggest that, since Mr. Oakes' 2008 Reports do not appear on this list, he did not submit them as he claims, and thus Mr. Oakes is fabricating his claim that he submitted these Reports, as is Mr. Furge, who assisted Mr. Oakes in submitting some of them, and who was aware of the Reports that Mr. Oakes submitted.

The evidence clearly establishes that before Ms. Combs began collecting the Reports and establishing a more centralized filing system, the Reports submitted by the employees were not filed or kept in any systematic fashion. Mr. Furge testified about a file of Reports that he reviewed with Mr. Murphy in 2008. There was testimony to suggest that Mr. Moss kept a file with Reports in his desk. Mr. Murphy at one point testified that he did not see a need to keep the Reports after they had been addressed. Mr. Wyatt did not receive, monitor, copy, or keep a master file of these Reports.

For her part, Ms. Combs, who was charged with compiling these reports in a more centralized fashion, testified that she gathered all of the reports that she could find. But she acknowledged that she was not familiar with how these Reports were kept before she began in late December 2008, nor could she say that she was able to collect every Report submitted in 2008.

⁵⁰ Although Mr. Murphy could not recall if he received Complainant's Exhibits 15 and 16, Mr. Wyatt signed the receipts, and testified that he would have given the letters to Mr. Murphy.

Indeed, both Mr. Oakes and Mr. Furge, whose testimony I found to be fully credible, identified numerous Reports that they had submitted to their supervisors, but which did not appear on Respondent's Exhibit 11.⁵¹ I note that there is no dispute that the underlying incidents, that is, the problems with the crossovers and gap in the track, the insufficient seating on the locomotive, and the instructions to perform a shove move to Omni, actually occurred.

Unfortunately for the Respondent, the evidence does not support a conclusion that Respondent's Exhibit 11 is an exhaustive and comprehensive list of all Reports submitted in 2008. Indeed, I find that, rather than establishing the definitive universe of Unsafe Condition Reports submitted in 2008, as the Respondent would have the Court believe, Respondent's Exhibit 11, by its stark omission of selected Unsafe Condition Reports unfavorable to the Respondent, itself sheds light on the Respondent's motivations in suspending and terminating Mr. Oakes.

Also telling is the fact that both Mr. Wyatt and Mr. Murphy have acknowledged that it is *possible* that Mr. Oakes submitted his Reports; neither one denied any knowledge of the reports, but stated only that they could not recall having seen them. I do not believe them.

I find that Mr. Wyatt and Mr. Moss, and Mr. Murphy, who made the decision to suspend Mr. Oakes and to terminate his employment, were aware of Mr. Oakes' protected activities at the time Mr. Oakes was suspended and then terminated.

Unfavorable Personnel Action

There is no dispute that Mr. Oakes suffered from an unfavorable personnel action. Indeed, his complaint encompassed two unfavorable personnel actions, his suspension for violation of the attendance policy, and his dismissal for using unbecoming language.

Contributing Factor

It is the Complainant's burden to prove by a preponderance of the evidence that his protected activity was a contributing factor in the unfavorable personnel action. A contributing factor is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Clark v. Pace Airlines, Inc.*, ARB No. 04-150 (Nov. 30, 2006), slip op. at 11. The legitimacy of an employer's reasons for taking an unfavorable personnel action should be examined when determining whether a complainant has shown by a preponderance of the evidence that protected activity contributed to the unfavorable action. *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037 (Jan. 31, 2006), slip op. at 14, citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). A complainant is not required to prove discriminatory intent through direct evidence, but may satisfy this burden through circumstantial evidence. *Douglas v. Skywest Airlines, Inc.*, ARB Nos. 08-070, 08-074 (Sep. 30, 2009); see *Fradley v. Tennessee Valley Authority*, 1992-ERA-19 and 34, slip op. at 10, n. 7 (Sec'y Oct. 23, 1995); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (6th Cir.

⁵¹ It is more than passing strange that the written reports submitted by both Mr. Oakes and Mr. Furge, both dismissed, and both in the process of prosecuting whistleblower claims, do not appear in Respondent's Exhibit 11.

1983). In circumstantially based cases, the fact finder must carefully evaluate all evidence of the employer's agent's "mindset" regarding the protected activity and the adverse action taken. *Timmons v. Mattingly Testing Services*, 1995-ERA-40 (ARB June 21, 1996). The fact finder should consider a "broad range of evidence that may prove, or disprove, retaliatory animus and its contribution to the adverse action taken. *Id.* at 5.

Temporal proximity can support an inference of retaliation, although the inference is not necessarily dispositive. *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041 (Nov. 30, 2005), slip op. at 9. Where an employer has established one or more legitimate reasons for the adverse actions, the temporal inference alone may be insufficient to meet the employee's burden to show that his protected activity was a contributing factor. *Barber v. Planet Airways, Inc.*, ARB No 04-056 (Apr. 28, 2006).

In whistleblower claims, complainants often must build their cases from pieces of circumstantial evidence which cumulatively undercut the credibility of the various explanations offered by the employer. *Hollander v. American Cyanamid Co.*, 895 F.2d 80, 85 (2d Cir. 1990). A fair adjudication of whistleblower complaints requires the "full presentation of a broad range of evidence that may prove, or disprove, retaliatory animus and its contribution to the adverse action taken." *Timmons v. Mattingly Testing Services*, 1995-ERA-40 (ARB June 21, 1996). In order to establish motivation, a complainant must prove a state of mind, something which is rarely, if ever, established with direct evidence.

The Board has held that it is proper to examine the legitimacy of an employer's reasons for taking adverse personnel action in the course of concluding whether a complainant has proved by a preponderance of the evidence that protected activity contributed to the adverse action. *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037 (Jan. 31, 2006), slip op. at 14, citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Proof that an employer's explanation is unworthy of credence is persuasive evidence of retaliation, because once the employer's justification has been eliminated, retaliation may be the most likely alternative explanation for an adverse action. See *Florek v. Eastern Air Central, Inc.*, ARB No. 07-113 (May 21, 2009), slip op. at 7-8, citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147-48 (2000).

Considering all of the evidence, as well as the reasonable inferences to be drawn therefrom, I find that Mr. Oakes' suspension, as well as his termination, were motivated primarily by retaliation for his protected activity, that is, his reporting of what he reasonably perceived to be safety concerns. I find that the Respondent's suspension of Mr. Oakes for allegedly violating the attendance policy was wholly pretextual, and its dismissal of Mr. Oakes for supposedly directing a profanity at a supervisor based on a total fabrication.

The record reflects numerous instances where Mr. Oakes, as well as Mr. Wolfersheim, reported safety concerns, using the procedures established by the Respondent, but never received a response to their concerns. Indeed, when Mr. Oakes, after being ignored about his formal report of insufficient seating on a locomotive, had the audacity to forward his complaint to the corporate safety officer, the Respondent's response was not to address Mr. Oakes' safety concerns, and discuss solutions, but to cite Mr. Oakes for operating a locomotive with

insufficient seating, when he had been explicitly instructed to do so by his supervisors. It is telling that Mr. Wolfersheim, who also signed off on the initial time claim, but did not pursue his claim up the chain of command, was not similarly treated.⁵²

Indeed, the mechanism used to chasten Mr. Oakes, a report of a failed efficiency test, also appears to be a complete fabrication. No one could recall seeing any supervisor actually performing an efficiency test on that date. I find that it is reasonable to infer that Mr. Oakes' supervisors fabricated this charge as well.

Several employees testified that when they brought safety issues to their supervisors' attention, they either received no response, or were brushed off with the claim that CF&E was a short line, and there was no money to handle the complaints.

Indeed, the evidence suggests that for the Respondent, placating customers was of more importance than ensuring safety. Thus, despite the fact that Mr. Oakes discussed the servicing of Omni with Mr. Moss, and explicitly voiced his concerns about the dangers of a shove move for this customer, just weeks later he was assigned to perform that very task. Mr. Oakes could not understand why, after talking with Mr. Moss about his concerns regarding the safety of this procedure, he was assigned to do it. When he voiced his concerns to Mr. Wyatt (Mr. Moss was apparently not available), he was instructed to perform the shove.

Mr. Wyatt, who attempted to justify this move by describing his previous experience performing shoves, admitted that when he performed a ten mile shove in his previous job, he had a caboose or shoving platform, and the ability to blow a whistle and apply the brakes. Mr. Oakes stated that, had that been the case, he might have agreed to the shove. It is eminently understandable that Mr. Oakes would question the safety of an assignment that would require him to hang onto a ladder on the lead car, a scrap gondola, for thirteen miles, without a whistle or brake to guard the crossings. Yet he was instructed to perform this move, so that the customer could be serviced more quickly. Indeed, as pointed out by the Complainant, despite CF&E's policy that "No job is so important, no service so urgent that we cannot take time to perform all work safely," and Mr. Wyatt's admission that the longer route was the preferable option, Mr. Oakes was expected to hang on the side of the lead car for thirteen miles, with no way to alert the public at crossings, or stop the train, so that a customer could be more quickly serviced.

The totality of the evidence reflects that safety was not a priority at CF&E, and that employees were expected to do as they were told, or face the consequences.

I find that the Respondent's suspension of Mr. Oakes for violation of the attendance policy was nothing but a sham. While this policy may have been in the rule book, it is clear that it had never been enforced in the manner it was imposed on Mr. Oakes. Indeed, the evidence in the record reflects that this policy was enforced only in the breach. Mr. Oakes had been out sick before, after a traffic accident, and was off work for four days in one week, and three in the next. He did not call in every day, or provide a doctor's note; no one told him he was supposed to do

⁵² The Respondent attempts to put Mr. Wolfersheim and Mr. Oakes on equal footing by claiming that Mr. Wolfersheim's claim was "resubmitted" by Mr. Oakes. Respondent's Response at 5. It was Mr. Oakes, not Mr. Wolfersheim, who pursued the time claim.

so, nor did he receive any discipline or informal training.

When Mr. Oakes needed to take time off to see his doctor, he followed the same procedures he had previously – he called customer service, and he also called his supervisor, Mr. Wyatt. Mr. Oakes told customer service that he would be off indefinitely, and this information was also conveyed to Mr. Wyatt.⁵³

Mr. Wyatt acknowledged that there was no specific training for the employees on the requirement that an employee on sick leave call in every day during an absence of more than one day. Nor did he advise Mr. Oakes that he needed to report every twenty four hours.⁵⁴ Mr. Wyatt was aware that Mr. Oakes did not report or call in for several days, but he made no attempt to contact him during that time.

Yet when Mr. Oakes reported back to work on December 23, 2008, he was told that he had violated the attendance rule as listed in the RailAmerica handbook; Mr. Moss told him that he had “abandoned” his job, and he was taken out of service.⁵⁵ It is not difficult to understand Mr. Oakes’ shock and disbelief at this turn of events.

The testimony clearly shows that the Respondent did not enforce this attendance rule until it relied on it as a reason for suspending Mr. Oakes. In addition to Mr. Oakes, Mr. Wolfersheim, Mr. Inskip, and Mr. Furge testified that they were unaware of a policy that required them to call in daily, nor had they heard of anyone who was disciplined for violating the policy. In fact, in addition to Mr. Oakes, Mr. Inskip and Mr. Furge had taken absences for several days previously, without calling in daily, and without discipline. Nor had any of the employees received any type of training on this policy, as required by the Respondent’s policies. The “Attendance Policy” posted at the yard office did not mention a requirement of calling in daily during an absence. Mr. Murphy testified that he did not really understand this policy or its enforcement at CF&E before he got there, yet he took Mr. Oakes out of service knowing that he had not been trained on the policy set out in the RailAmerica handbook.

Nor do I credit the Respondent’s apparent claim that Mr. Oakes’ absence created a manpower shortage and delayed deliveries to customers, as stated by Mr. Murphy. I note that on December 17, 2008, when Mr. Oakes decided he needed to see his doctor, he had been laid in, *i.e.*, told that he would not be working that day, because business was slowing down. And Mr. Wyatt testified that they were able to cover the work from the extra board, without any service interruptions, for the three days that Mr. Oakes was absent.⁵⁶

I find that the Respondent’s sudden enforcement of this policy is strong circumstantial

⁵³ That Mr. Oakes did not directly state to Mr. Wyatt that he would be out “indefinitely” is of no moment; Mr. Wyatt received this information from customer service.

⁵⁴ The Respondent’s reliance on Mr. Wyatt’s testimony that he told Mr. Oakes “let us know” hardly qualifies as an instruction to report in every 24 hours. Respondent’s Reply at 6.

⁵⁵ Mr. Murphy testified that, when Mr. Furge was charged with job abandonment, he did not take him out of service pending an investigation, because that would have been “prejudging.” Apparently he did not feel so constrained when it came to Mr. Oakes’ charge of job abandonment.

⁵⁶ While Mr. Oakes may have been “off” for five days, as the Respondent claims, he was only “off work” for three. See Respondent’s Response at 7.

evidence of its motives, which had nothing to do with enforcing the attendance policy, but everything to do with stifling Mr. Oakes.

I find that the Respondent's termination of Mr. Oakes for allegedly directing profanity at a supervisor was based on a total fabrication. Mr. Oakes was understandably upset, having just returned from sick leave and been suspended for violation of a policy of which he was unaware, and which had never been enforced before. Mr. Oakes acknowledged as much, but categorically denied that he referred to Mr. Wyatt as "that f--cking trainmaster." I believe him.

Mr. Wyatt's many recountings of this incident differ in pertinent details. For example, at the investigation, he stated that Ms. Combs was in her office and could hear the conversation, but then stated that she did not hear the conversation, because she was not there. He also testified that Ms. Combs approached him and Mr. Moss and told them that she had overheard the alleged statement, when Ms. Combs has testified otherwise. At the hearing, Mr. Wyatt stated that he could not recall if Mr. Inskip was in earshot, although he testified at the investigation that he was in earshot, and in a position to have overheard the conversation. In fact, Mr. Inskip testified that he was present, and that Mr. Oakes was upset, and possibly raised the volume of his voice, but he was not yelling. He did not recall hearing Mr. Oakes use profanity, or call Mr. Wyatt a "f--cking trainmaster." Indeed, in a crew room where several people have stated it is hard not to overhear conversation, Mr. Wyatt was the only person who claimed to have heard Mr. Oakes call him a "f--cking trainmaster."⁵⁷

I note that Mr. Oakes' suspension for the alleged attendance policy violation, as well as his termination for the alleged use of profanity, followed directly on the heels of his submission of his Unsafe Condition Report regarding insufficient seating not only to Mr. Murphy, but to a corporate safety officer. I find that this temporal proximity also supports the reasonable inference that Mr. Moss, his supervisor, seized on Mr. Oakes' absence for medical treatment to enforce a policy that, while it was in the rulebook, had never been enforced before. Mr. Moss then bolstered this suspension with the fabricated charge of unbecoming conduct, which he took to Mr. Murphy, who, in consultation with Mr. Moss, decided that Mr. Oakes should be fired.

I find Ms. Combs' testimony regarding this incident to be particularly suspect, and not worthy of credibility. She testified that she was in her office on December 23, 2008, and heard a "pretty heated discussion," with some "vulgarity" being shouted in the crew room. This conversation took place right outside her door, and involved Mr. Oakes, Mr. Wyatt, and Mr. Moss, although she could only hear two voices. Ms. Combs did not further describe the "vulgarity," nor did she remember how many vulgar words were used. Despite the fact that this was her second day of work, and she could not recall if she met Mr. Oakes the day before (when he was not in fact working), and she did not see the persons involved in the conversation, Ms. Combs identified Mr. Oakes as the person who uttered the alleged vulgarity or vulgarities.⁵⁸ Yet although this conversation made an impression on her, and caused her to question whether she wanted to continue to work there, Ms. Combs did not tell anyone about this conversation,

⁵⁷ Mr. Murphy attributes the fact that he heard nothing on that day to his hearing loss. I note that Mr. Murphy did not seem to have much difficulty hearing questions during his testimony.

⁵⁸ Mr. Oakes testified that his final exchange with Mr. Wyatt, in which he is alleged to have called Mr. Wyatt a f--cking trainmaster, occurred not in the crew room, but as he was going out the door.

including Mr. Murphy, who was sitting in the same room, ten feet away. Indeed, she did not recount this story until more than three years later, at her deposition two weeks before the hearing. I do not find her testimony on this issue to be the least bit credible.

Indeed, Mr. Oakes' alleged use of this language did not spark an immediate reaction that might suggest it was above and beyond what was normally tolerated in the workplace. Mr. Wyatt went about his business after this alleged incident, and did not draft the notice of this alleged infraction until six days later.

The conclusion that Mr. Oakes was suspended, and terminated, in retaliation for his reporting of safety concerns, is further bolstered by the severity of the sanction imposed for the use of language that was in everyday usage at CF&E.⁵⁹ Several witnesses, including Mr. Oakes, Mr. Furge, Mr. Wolfersheim, Mr. Inskeep, and Mr. Wyatt, confirmed that it was common for employees as well as managers to curse at work, including the use of the "F" word.

Once a complainant has shown that his protected activity was a contributing factor in the adverse employment action, the respondent is liable unless it can prove by clear and convincing evidence that it would have taken the same action absent the protected activity. *Patino v. Birken Manufacturing Co.*, ARB No. 06-125, 2005-AIR-23 (July 7, 2008). As a general proposition, proof that an employer's explanation is unworthy of credence is persuasive evidence of discrimination, because "once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation" for an adverse action. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147-48 (2000).

I find that the Respondent has not established, by clear and convincing evidence or otherwise, that it would have taken the same actions if Mr. Oakes had not engaged in protected activity. There was no "intervening event," as argued by the Respondent, that severed the causal connection between Mr. Oakes' reporting of safety concerns and his suspension and dismissal. Rather, I have found that Mr. Oakes' suspension for violating the attendance policy was wholly pretextual, and his dismissal for uttering profanity to a supervisor complete fabrication. Considering the evidence as a whole, I find that it overwhelmingly establishes that Mr. Oakes was not disciplined because he violated the attendance policy and the conduct policy. He was disciplined because he was a "complainer," who reported his legitimate concerns about safety, and pressed for answers.

Nor has the Respondent shown that it treated similarly situated employees in the same way. Indeed, Mr. Oakes appears to have been the only employee who was charged with job abandonment, or suspended, for not calling in each day while he was out on leave. Mr. Murphy made the decision to discharge Mr. Oakes without consulting with his supervisor, as required by CF&E policy. Nor is there any persuasive evidence that anyone else at CF&E has been charged or disciplined in connection with the use of offensive language, other than Mr. Oakes.⁶⁰

⁵⁹ Nor does it appear that Mr. Murphy followed company protocol, as he did not consult his supervisor, Mr. Ovitt, before making the decision to discharge Mr. Oakes.

⁶⁰ The "CF&E Record Review" prepared by Ms. Combs indicates that Mr. Augatis was discharged in September 2009 for conduct unbecoming an employee including cursing a Trainmaster (RX 12). There was no testimony regarding the circumstances surrounding Mr. Augatis' dismissal; Mr. Murphy referred to one other employee who

Indeed, once the Respondent's alleged basis for the discipline of Mr. Oakes for violating the attendance policy and engaging in improper conduct has been eliminated as a pretext, I find that it is eminently reasonable to conclude that Mr. Oakes was disciplined because he engaged in protected activity, and for no other reason.

CONCLUSION

Based on the foregoing, I find that Mr. Oakes, the Complainant, has established that Central Railroad Co. of Indianapolis, d/b/a Chicago, Fort Wayne and Eastern Railroad, the Respondent, retaliated against him for his reporting of safety complaints, in violation of the FRSA. As I advised the parties at the hearing, the issues of damages and attorneys' fees were not required to be briefed pending a determination on the merits. As I have now made the determination that Mr. Oakes has established a violation of the FRSA, Mr. Oakes will have until August 31, 2012 to submit argument on the amount of damages he believes he is entitled to, as well as appropriate attorney fees. The Respondent will have until September 21, 2012 to submit a response, and Mr. Oakes will have until September 28, 2012 to submit any reply.

SO ORDERED.

A

LINDA S. CHAPMAN
Administrative Law Judge

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

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

was dismissed, that they "had some problems with," involving "hostile and malicious actions," but no cussing.

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).