U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 07 August 2013

CASE NO.: 2011-FRS-00017

In the Matter of:

BRIAN PETERSEN,
Complainant,

v.

UNION PACIFIC RAILROAD COMPANY,
Respondent.

Appearances:

Louis Jungbauer, Esq.,
Justin Brunner, Esq.,
Yaeger, Jungbauer & Barczak, PLC, St. Paul, MN
For Complainant

Steven Olsen, Esq.
Simmons Olson Law Firm, PC, Scottsbluff, NE
Rami Hanash, Esq.,
Omaha, NE
For Respondent

Before: Pamela J. Lakes
Administrative Law Judge

DECISION AND ORDER GRANTING CLAIM

This case involves a claim under the employee protection provisions of the Federal Rail Safety Act, as amended, 49 U.S.C. § 20109, ("FRSA"), with implementing regulations at 29 C.F.R. Part 1982 (2011). The FRSA prohibits an employer from discriminating against, or taking unfavorable personnel action against, an employee because the employee reported a work-related injury or engaged in other protected whistleblowing activity. Complainant Brian Petersen ("Complainant") alleges that Union Pacific Railroad Company ("Employer," "Respondent" or "Union Pacific") terminated him in retaliation for reporting a previous work-related injury. For the reasons set forth below, I find that his claim has merit and Complainant is therefore reinstated and awarded damages.

PROCEDURAL HISTORY

On February 4, 2010, Complainant filed a timely complaint with the United States Department of Labor's Occupational Safety and Health Administration ("OSHA") alleging that he was subjected to adverse action, and specifically that he was terminated because he engaged in protected activity by reporting injuries he sustained while employed by Respondent. OSHA investigated the complaint, and on April 8, 2011, the Regional Administrator, on behalf of the Secretary of Labor, found there was reasonable cause to believe that Respondent violated the FRSA. On May 6, 2011, Respondent timely filed an objection and request for a hearing and the case was docketed in the Office of Administrative Law Judges.

On May 23, 2011, the undersigned administrative law judge filed a Notice of Assignment, Notice of Hearing and Prehearing Order. The originally scheduled hearing was canceled by agreement of the parties and was rescheduled to be held from May 22 to 23, 2012. The hearing began on those dates and following a hiatus it concluded on August 14 and 15, 2012.

At the hearing, the witnesses were excluded from the courtroom except for Complainant and David Thalken, Union Pacific's shop director in North Platte, who acted as Respondent's representative. [1] On May 22, 2012, testimony was provided by Complainant Brian Petersen (Tr. 42), Mark Steven Wright (an electrician who worked with Complainant, Tr. 223), and Patrick Waalkens (a supervisor foreman for Union Pacific, Tr. 259); the following day, John Robert Winchell, Sr. (a retired supervisor and union official, Tr. 315) testified. When the hearing reconvened on August 14, Respondent began its case, and testimony was provided by David Thalken (shop director for Union Pacific in North Platte, Tr. 427), Michael Halverson (locomotive manager for Union Pacific at the North Platte diesel facility, Tr. 607), Christopher Paulsen (a machinist who worked with Complainant, Tr. 667), Mark Thompson (a safety facilitator and machinist, Tr. 687), and Jerry Mullen (a union official who counseled Complainant, Tr. 706). Michael Phillips (general director for labor relations for Union Pacific, Tr. 825) testified on August 15, 2012. The record closed at the end of the hearing, subject to briefing on the issue of the admissibility of the deposition of Cameron Scott, C48, which I had provisionally excluded; that briefing was due on September 14, 2012.[2] Simultaneous briefs on the merits were due on November 15, 2012 and responses were due on December 17, 2012.

Both parties prepared briefs on the issue of the admissibility of the deposition, served by mail on September 14 and 15, 2012, both of which are accepted as timely. Complainant's brief on the issue was filed on September 19, 2012.

Respondent did not formally file any briefing, instead merely sending a courtesy copy to the undersigned via email. Inasmuch as there has been no apparent prejudice, I will consider Respondent's briefs, both on admissibility of the deposition and on the merits; however,

[1] References to the hearing transcript appear as "Tr." followed by the page number. Complainant's exhibits, Respondent's exhibits, and Administrative Law Judge's exhibits are referenced as "C," "R," and "ALJ" respectively, followed by the exhibit number.

[2] As is more fully discussed below, I have reaffirmed my exclusion of C48, and the record is therefore closed.

Respondent is cautioned that the rules of practice and procedure for the Office of Administrative Law Judges (29 C.F.R. Part 18) do not allow for filing by email, and the briefs have not been recorded as filed on the OALJ case tracking/docketing system. In the future any items submitted by email will not be deemed to have been filed with this tribunal.

Complainant's initial brief was served on November 20, 2012 and filed on November 26, 2012 and Complainant's response brief was served on December 31, 2012 and filed on January 8, 2013. Respondent's brief was served on November 20, 2012 and Respondent's reply was served on December 31, 2012; neither brief was filed, although a courtesy copy of each was emailed. All of the briefing is, however, accepted as timely.

On February 21, 2013, Complainant filed a Notice of Important Intervening Decision. Specifically, Complainant provided a copy of the precedential decision of the U.S. Court of Appeals for the Third Circuit dated February 19, 2013 in the case of *Araujo v. New Jersey Transit Rail Operations, Inc.*, No. 12-2148 (now reported at 708 F.3d 152).

The record is closed and the case is ready for decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

STIPULATIONS

The parties entered into stipulations that were admitted as ALJ 1. These included that Complainant was an employee of Union Pacific from November 1, 2005 to September 17, 2009; that Union Pacific was a railroad carrier engaged in interstate commerce during the time of his employment; that General Electric was a contractor or subcontractor of Union Pacific at Union Pacific's Bailey Yard in North Platte, Nebraska during that period; that Union Pacific discharged Complainant on September 17, 2009; and that on February 4, 2010 Complainant filed a complaint with OSHA alleging that Union Pacific violated FRSA and that he had suffered damages. (ALJ 1).

FACTS

Complainant's Testimony

Complainant was a highly credible witness. He testified that he had worked for Union Pacific beginning in November 2005, when he started as a machinist helper. (Tr. 43). The job entailed packing motors, oil testing, and checking tools. (Tr. 43-44). The following year (in September or October of 2006), he qualified for an apprenticeship as a machinist. (Tr. 44-45). He received "lots of training" on locomotive maintenance and safety, he attended safety meetings, and he was tested concerning his knowledge of safety rules. (Tr. 46).

Crankcase Incident

The first time that Complainant was injured was in February 2007, when he had been working for Union Pacific for between a year and a year and a half. (Tr. 48). At that time, he

was assigned to work as an apprentice for two machinists, Shane Stout and Scott Guimen. (Tr. 49). On the day of the injury, they were in the process of changing out main bearings, which involved dropping the main caps off the crankshaft and replacing them with new ones. (Tr. 50). Something had fallen into the crankcase, and he and Scott were trying to get it out unsuccessfully. (Tr. 51). Scott then moved, but Complainant could see him across from the crank case. (Tr. 51). He told Shane, "I think I felt it in there, but I have to get my head kind of in there to see if I can actually reach it." Shane replied, "I don't care, just get it out." He then reached in to the crankcase, while he was lying on a step plate, with his right arm and head inside the crankcase. The next thing he knew, he felt something touch the back of his head, and when he pulled out, he was caught between the crankcase opening and the throat of the crankshaft, which then started to roll his head into the crankcase. According to Complainant, the only way that could have happened is if another person had physically operated the mechanism, and he believed that person to be Scott Guimen, because only the three of them were working on the locomotive. After the incident, he was spitting out blood and teeth, and he was taken by ambulance to the hospital. (Tr. 51-53).

The injury was reported (ALJ 1, C54). On the injury report, another employee, Jim Gruzon, was also listed as present. (C54). According to the report, Complainant reached into the crankcase and a machinist on the other side turned on the motor, pinching him inside the crankcase. (C54). The locomotive was later modified so that switches on both sides would have to be depressed for the turning jack to operate. (Tr. 60). Neither Complainant nor the other crew members were disciplined for the incident, to the best of Complainant's knowledge. (Tr. 58). However, Complainant thought that the other two employees were at fault. (Tr. 158).

Despite the lack of formal discipline, Complainant perceived that he was treated differently as a result of the incident. When he returned to work, he was told by Jerry Mullen that "we, as machinists, do not make a habit of sticking our heads into crank cases." (Tr. 58). Also, he was assigned a buddy to check on him for the next six months. (Tr. 59-60). There was another incident which he perceived as disparate treatment, when he was challenged for wearing tinted lenses when an employee wearing darker lenses was not. (Tr. 61). At another time, someone else unfairly accused him of putting his finger in an intake port hole. (Tr. 61-63). At times, other workers complained that he worked too fast but not specifically that he was working unsafely. (Tr. 63-64).

After the incident, Complainant acquired the nickname "Crank Case." (Tr. 227 [Wright], Tr. 265 [Waalkens]; Tr. 358 [Winchell]). According to Patrick Waalkens, a supervisor foreman who had worked for Union Pacific for 15 years, a credible witness, people didn't want to work with him after the incident. (Tr. 265-68, 295). He explained that the other workers felt he was unsafe and was "too eager to work" as a result of that single incident.[3] (Tr. 267). However, he also indicated that some employees (the machinists in "light repair mechanics") had complained about him even before that incident. (Tr. 294-95). Waalkens also testified that the crankcase incident was safety related and therefore, as a reportable incident, impacted Union Pacific's

[3] It appears that the accident was misreported at the worksite. Waalkens, who had heard about the incident, was under the impression that Complainant had put his head in the crankcase to double check on something and was not aware that he had been ordered to retrieve a fallen item from the crankcase, as Complainant credibly testified and the contemporaneous accident report indicated. (Tr. 267-69; C54).

safety record. (Tr. 262-63). It had to be reported to the Federal Railway Administration. (Tr. 263-64).

Parking Lot Incident

Complainant's next injury occurred on August 28, 2009, in the late evening, when he was working at the GE run through facility.[4] (Tr. 64, 66; C2). Toward the end of his shift, before midnight, he went to his car to drop off a crock pot he had brought for an office pot luck.[5] (Tr. 64, 66-68). He learned against his car and took out his cell phone, to see whether he had missed a call from the union representative concerning available overtime.[6] (Tr. 71-72). He had his legs crossed, with his left foot on top of his right foot. (Tr. 77). He described it as a common practice to use a cellphone in the parking lot in that manner, and he did not consider himself to be in a "red zone" or in "the line of fire."[7] (Tr. 72-73, 76). The parking lot was dimly lit. (Tr. 74). After only about 30 seconds, as he was looking at his phone, a car driven by Nathan Coco pulled in to the diagonal spot next to his and ran over his feet, stopping when the tires were on his feet.[8] (Tr. 77, 162). Coco left abruptly, and Complainant overheard Mark Wright telling him that he was on top of Complainant's feet. (Tr. 77). At that point, Coco jumped back in the car and pulled forward, then he exited his car and entered the building. (Tr. 77).

Mark Wright, an electrician who had been employed by Union Pacific for 20 years, witnessed the incident. (Tr. 224). He was a credible witness. He explained that both he and Complainant were working the second shift, which ran from 4:00 p.m. to midnight. (Tr. 228). Via a diagram, admitted for demonstrative purposes as ALJ 2, Wright explained how the incident occurred. He marked where he was standing with a blue X and where Complainant was standing with a red X, leaning on the car closest to the shift assembly building. (Tr. 234-35, ALJ 2). He first observed Nathan Coco coming around by the light pole, at a rate of speed that was "way too fast for the situation"; Coco then pulled into a parking spot and stopped with his rear wheel on Complainant's foot, at which point Complainant yelled something like, "You're on my foot." (Tr. 235-36, 256-57). On the diagram, he depicted Coco's path with a green marker. (Tr. 235-36; ALJ 2). According to Wright, Coco didn't believe Complainant when he said he was on his

[4] Complainant's shift began at 4:00 p.m. (Tr. 84-85).

[5] Complainant testified it was common practice for workers to take their personal belongings to their cars before their shifts ended. (Tr. 67). Wright did not recall that there had been a pot luck; however, he testified that it was not necessary for an employee to tell his supervisor or foreman that he was going into the parking lot at the time of the incident. (Tr. 229, 231). Waalkens was also unaware of any policy against employees going out into the parking lot at the time of the incident and indicated that, if there were such a policy, it was not enforced. (Tr. 271).

[6] Complainant acknowledged that the cell phone was an electronic device and that under the Union Pacific cellphone rule, cell phones were to be used only for business purposes and were not to be used in red zones. (Tr. 160-61, 172). However, he testified that he was using the phone for business and was not in a red zone at the time of the incident. (Tr. 76). Complainant described a red zone as including "locomotives and tracks and any machinery that would be stagnant or in use." (Tr. 174). He explained: "Most of the time it was stressed not to walk and talk while on the cellphone" but that, when using the cellphone to conduct company or union business, the worker was supposed to "stop in a safe area which would not be a red zone, continue, finish your call, and then stop, look around, make sure you're still safe, and then continue on your path." (Tr. 178).

[7] He explained that to be in the line of fire, he would have to be standing in the middle of the road or between tracks. (Tr. 77).

[8] At the hearing, Complainant was not sure whether he saw Coco weaving through the parking lot prior to running his foot over, as he had apparently told the investigator. (Tr. 165-66; C38).

foot at first, but eventually he got back into his car and moved it. (Tr. 237). When asked whether Complainant could have gotten out of the way, Wright explained that it happened so fast that there was no reason for Complainant to think he needed to move. (Tr. 237). Wright also testified that workers used cell phones in the parking lot and it was an accepted procedure at the time of the incident, because there was no intercom.[9] (Tr. 239-40). Wright believed that the parking lot was a "red zone" but the area where Complainant was standing was not, and he did not think Complainant was being unsafe using his cell phone as he was standing still. [10] (Tr. 251, 253-54).

The parties stipulated that Complainant notified Union Pacific of the injury on August 28 or 29, 2009. (ALJ 1). In that regard, the period of the incident and its aftermath began before midnight and extended into the early hours of the next day. Complainant, who had been wearing safety shoes, testified that he walked around after the incident to make sure everything was okay, but when the time came for him to check out for the night, his back started to spasm so he decided to report the incident. (Tr. 77-78). Complainant testified that he called Jim Gray, the Union Pacific Foreman, who referred him to Craig Gribble, the technical director for GE, who took his statement. (Tr. 66, 78). He also filled out a report of personal injury or occupational illness form. (Tr. 78, C2). Gribble called Jeff Smith, the head technical director for the GE transportation system, and they made arrangements to have the nurse check him out. (Tr. 79-80). The nurse started the ice process and checked out his foot, and at that point his back was no longer spasming. (Tr. 80). He was then given a urinalysis to make sure he had no drugs or alcohol in his system, then went to Smith's office for paperwork, and did not leave the facility until about 3:00 in the morning. (Tr. 80-81). His meeting with Smith occurred in the early hours prior to 3:00 a.m. of August 29 (Tr. 85-86).

Later that same day (August 29), Complainant returned to work at around 4:00 p.m. and was told by Gene Uppal, another technical director for GE, to come in to the back room, where he was told that he would have to leave and Uppal would escort him out. (Tr. 83). Uppal did not give him an explanation. After that, he contacted his union representative, Jerry Mullen, who advised him what was going to take place. (Tr. 86, 197).

Charges and Notice of Investigation

The parties stipulated that on September 9, 2009, Union Pacific notified Complainant that it was going to hold a hearing to investigate whether he violated any rules on August 28, 2009. (ALJ 1). The Notice of Investigation was dated September 9, 2009. (Tr. 87, C8). It provided notice for Complainant to appear at a hotel conference room on September 17, 2009:

> . . . for investigation and hearing to develop the facts and determine your responsibility, if any, on charges that while employed as a Machinist at the North

[9] Waalkens testified that after the parking lot incident, there was a policy change, and the workers were not allowed to go into the parking lot during working hours. (Tr. 273-74)

[10] Waalkens testified that both the parking lot and the spaces would be considered the red zone. (Tr. 298). However, he also testified that in August of 2009 it was common practice for employees to use their cell phones in the parking area. (Tr. 299-300). Winchell did not believe Complainant was in a red zone when he was struck. (Tr. 375). Thalken believed the parking lot to be a red zone. (Tr. 458).

Platte GE Run-Thru Facility on Saturday, August 28, 2009 at approximately 23:45 while on-duty, you were allegedly checking messages on your cell phone in the GE Parking Lot and may have **failed to be alert and attentive** and may have **failed to take precaution to avoid having your feet run over** by Nathan Coco as he was attempting to park his automobile, resulting in you **sustaining a possible injury** to your feet and back.

These allegations, if substantiated, shall constitute a violation of Union Pacific Company Rules, effective April 3, 2005:

Rule 1.1.2: Alert and Attentive
Rule 1.10: Games, Reading or Electronic Devices
Rule 70.1: Safety Responsibilities
Rule 70.5: Protection of Body Parts
Rule 1.6: Conduct: Part 1, Careless of Safety; part 2, Negligent
Any act of hostility misconduct, or willful disregard or negligence affecting the interests of the Company or its employees is cause for dismissal and must be reported. Indifference to duty, or to the performance of duty, will not be tolerated. You are also in possible violation of the Mechanical Department Policy for Use of Cell Phones or Similar Devices, Revised: July 13, 2009.

These allegations, if substantiated shall result in the assessment of Upgrade LEVEL 5 Discipline, Permanent Dismissal. [Emphasis added.]

(C8). Complainant was further advised that he was "being withheld from service pending the outcome of this investigation." (C8). During the investigation, Complainant would be in non-pay status. (Tr. 220).

Rules Allegedly Violated

The rules and policy Complainant allegedly violated (which appear in C11 through C17) are:

Rule 1.1.2: Alert and Attentive
"Employees must be careful to prevent injuring themselves or others. They must be alert and attentive when performing their duties and plan their work to avoid injury." (C11).

Rule 1.10: Games, Reading or Electronic Devices
The rule sets forth responsibilities for use of cell phones and electronic devices. They prohibit the use of electronic devices not used for work related purposes while on duty but allow the use of cell phones under certain circumstances. (C12).

Rule 70.1: Safety Responsibilities.
The rule, inter alia, requires that employees "[b]e responsible for their personal safety and accountable for their behavior"; "[t]ake every precaution to prevent injury to themselves, other employees, and the public"; "[b]e aware of their surroundings and maintain situational awareness

to avoid risks"; and "[u]se good judgment when assessing the safety of all tasks to avoid injury or damage to equipment." (C13).

Rule 70.5: Protection of Body Parts

"Do not place hands, fingers, feet, legs or any part of your body in a position where they might be struck, caught, pinched or crushed." (C14).

Rule 1.6: Conduct: Part 1, Careless of Safety; part 2, Negligent (C15). The rule prohibits employees from being careless of safety, negligent, insubordinate, dishonest, immoral, quarrelsome or discourteous, but only the first two were charged. It also provides that willful disregard or negligence affecting the interest of the company or its employees was a cause for dismissal and must be reported. (C15). Under the Union Pacific Railroad Policy and Procedures for Ensuring Rules Compliance, "Careless of Safety" and "Negligent" are defined:

> CARELESS OF SAFETY: When an employee's actions demonstrate an inability or an unwillingness to comply with safety rules as evidenced by repeated safety rules infractions. When a specific rule(s) infraction demonstrates a willful, flagrant, or reckless disregard for the safety of themselves, other employees, or the public.
>
> * * * *
>
> NEGLIGENT: An employee demonstrates negligence when his or her behaviors/actions cause, or contribute to, the harm or risk of harm to the employee, other employees, the general public or company property.

(C17).

The other possible violation related to the Mechanical Department Policy for Use of Cell Phones or Similar Devices, Revised: July 13, 2009. That mentioned, inter alia, that cell phones must not be used in a red zone or in the line of fire. (C16). That language does not appear in the rule relating to the use of cell phones or electronic devices, however.

Leniency Agreement

After the paperwork for the charges against Complainant had been completed, he was offered "the leniency." (Tr. 86-87). Mullen told him that it was up to Thalken to accept or deny the leniency, which Mullen had requested on his behalf. (Tr. 87). The union representative, Mullen, recommended that he take the leniency so that he could go back to work and provide for his family because "more times than not, the person that does take it to investigation doesn't win." (Tr. 88-89).

Complainant decided to sign the leniency document and returned to work on a Friday to do so, at which time he met with Mullen and Theresa Kelley, manager of personnel operations. (Tr. 89-90). Mullen told him that he was aware of only one instance in which an employee who had taken an issue to investigation actually won. (Tr. 90). Complainant was concerned that,

inasmuch as the investigation was to be conducted by Union Pacific officials, they would be looking at it from the railroad's standpoint and not his, and he felt he had no choice but to sign the leniency agreement. (Tr. 91-92, 219). Complainant felt that Mullen had not properly represented him and could have done more. (Tr. 195-96).

Under the terms of the Leniency Agreement (dated September 10, 2009 and signed by both parties on September 11), Complainant waived his right to an investigation, he agreed to accept dismissal from service as discipline, the parties agreed that his time out of service would be considered to be an unpaid suspension, and he was returned to service on a probationary basis for an 18-month period, during which a violation of Rule 1.6 would be grounds for removal from service without an investigation. (C9). The agreement also provided that any claims filed on Complainant's behalf as a result of the incident would be withdrawn and dismissed in their entirety. (C9).

The parties stipulated that no investigatory hearing was conducted because the parties entered into a leniency agreement on September 11, 2009. (ALJ 1).

Union Involvement

Jerry Mullen was the local chairman of the International Association of Machinists and Aerospace Workers in North Platte, the union to which Complainant belonged. (Tr. 707-08). By demeanor, he was not a particularly credible witness; he was defensive at times and he seemed somewhat hostile to Complainant. Also, his testimony concerning his understanding of the cranckcase incident was implausible.[11] I did not find him to be a reliable witness.

Initially, he claimed to have heard complaints about Complainant, primarily that he would visit his father (who also worked for Union Pacific) during breaks, but also that he would "stick his hands where he wasn't supposed to." (Tr. 716-17). He and John Bargell, the apprentice instructor, thought about going to management to "fix the situation" but did not. (Tr. 718-20). Then he was notified about the Crankcase incident, and he and Bargell subsequently counseled Complainant to be safe.[12] (Tr. 713-14). After the Crankcase incident, the mechanics told him that they did not want to work with him. (Tr. 720-21).

Mullen learned about the parking lot incident when Complainant called him the next day and told him that he had been pulled out of service. (Tr. 723). He indicated that Complainant told him that he was concentrating on his phone and that Coco came into a spot right next to his car, and drove over his foot. (Tr. 724). Mullen went to Jeff Smith, the GE manager, and asked him if there was anything he could do to get Complainant back to work and was told no. (Tr. 775). Almost initially, he was critical of Complainant. When Complainant showed him a couple

[11] See footnote 12 below.

[12] The machinists apparently denied to Mullen that they had ordered Complainant to retrieve the item from the crankcase and Mullen testified that they separately claimed they yelled "Rolling over," contrary to the accident report (C54), the remedial action taken (requiring switches on both sides of the crankcase to be turned on, Tr. 60), and Complainant's own account. (Tr. 769-70, 811). It would, of course, make no sense for both of them to issue such a warning if they were on opposite sides of the crankcase, nor would it make any sense for Complainant to reach into the crankcase if he were warned that the machine was on. Nevertheless, Mullen apparently accepted their account over that of Complainant.

of pictures on his phone, he did not understand how the cars could be so close without Complainant seeing Coco drive in; however, he admitted that would probably have not kept him from getting run over. (Tr. 725). He also questioned whether there would be overtime still available at that time of the evening. (Tr. 728-30). When Complainant brought up things that Coco had done wrong, he pointed out that Complainant should not have been on his cellphone. (Tr. 727-28). He made no apparent effort to defend Complainant or suggest wrongdoing on the part of Coco for running over Complainant's foot, and he felt he achieved a good result with the Leniency Agreement. (Tr. 739-40). Mullen acknowledged that under the Leniency Agreement, an allegation by a manager that Complainant broke a rule would result in his termination, on the manager's word alone, and there would be no investigation. (Tr. 793-94).

Mullen also suggested to Complainant that he not go back to the same workplace because Coco was there. (Tr. 744).

Safety Meeting

Complainant met with Halverson, a manager for Union Pacific, along with a few machinists and a few electricians a couple of days after he returned to work. (Tr. 105, 108). The morning of the meeting, while installing traction motors, Complainant had dropped a pry bar between the cradle and opening of the drop pit, and he had to sit down to retrieve it safely, making it look as if he had fallen. (Tr. 106-07). He was advised by Cory Beecham, the foreman on duty, that a meeting was going to take place. (Tr. 107). At the meeting, according to Complainant, "[a] bunch of people were saying that since he came back, he was working unsafe" but the only specific incident mentioned was the one with the pry bar that had just occurred. (Tr. 108). He did not recall exactly what he said at the meeting; however, he denied that he would have said anything reflecting that he didn't care about safety. (Tr. 109). Complainant's understanding was that the only way a meeting of that sort would be scheduled would be if the workers asked for it. (Tr. 191-92).

Michael Halverson, who was manager for locomotive maintenance for Union Pacific at the North Platte diesel facility, recalled the meeting but did not remember the date. (Tr. 607-08, 622). He was a credible witness. According to his testimony, the local chairman, the TSC coordinator, and the drop pit crew came to his office and said they had a safety concern; they were tired of Complainant "working unsafe"; and they "wanted it addressed."[13] (Tr. 622). Halverson asked them to work it out themselves based upon the Total Safety Culture (TSC) program, discussed below. (Tr. 622-23). He left after Complainant made a comment to the effect that sometimes he shouldn't do things, but he just wanted to get the job done, so he would just go ahead and do it. (Tr. 623-24, 642, 644-45). Halverson and the others were very surprised at the comment, and he got up, and again asked the TSC coordinator and the union representative to handle it. (Tr. 623-24). The meeting continued after he left. (Tr. 624).

Mark Thompson, a machinist, was the TSC facilitator involved in the meeting. (Tr. 688-89). I have no reason to question his credibility. He recalled the incident that precipitated the meeting as involving a table (used for taking traction motors in and out of locomotives) that was

[13] A number of vague allegations about Complainant working unsafely had been made to both Halverson and Thalken, as discussed below.

misaligned; Complainant used a pry bar to jimmy it into place, which he was not supposed to do and was allegedly told not to do (although other employees had done it in the past). (Tr. 689-90, 702-03). Thompson had received complaints about Complainant's safety prior to the meeting but, as TSC facilitator, he would not go to management but would try to work it out with the employees.[14] (Tr. 692). At the meeting, there were four workers from the drop pit, and they went around the table and each voiced his opinion. (Tr. 693). Complainant had an opportunity to speak, and Thompson recalled his exact words were, "Sometimes I know it's wrong, but I just say what the fuck and I do it, anyway." (Tr. 693, 704). At that point, Halverson left, in apparent shock over Complainant's statement, according to Thompson. (Tr. 694). Thompson explained that the workers all liked Complainant but did not feel comfortable working with him and wanted "more safe behaviors." (Tr. 700-01).

Timken Bearing Incident

The parties stipulated that on or about September 15, 2009, Complainant was observed to be standing on a Timken bearing and was taken off duty. (ALJ 1). At that time (approximately four days after signing the leniency agreement, and one to two days after the meeting with Halverson), Complainant was directed to obtain serial numbers for a shipment of traction motors, in order to ensure that the shipping manifest was correct. (Tr. 94-95, 106). The traction motors were used to provide forward or reverse thrust/dynamic braking for locomotives, and the drive shafts of the motors had bearings at the end which were called Timken Bearings. (Tr. 94). On that day, he was working as a floater with two machinists who were more senior than he was, Geurells [mistranscribed as "Gerols"] and Paulsen [mistranscribed as "Pawlsen."] (Tr. 95-96; see also Tr. 667-68, 683 [Paulsen]). When he attempted to get on the truck where the motors were waiting to be unloaded, Paulsen and Geurells told him that he was not allowed up there because there was no fall protection and it would be an "at risk behavior." (Tr. 96). He asked whether they could set the traction motors on the ground so that he could get the serial numbers and was told that would take too long and he should just get them as the motors were set down on the other motors. (Tr. 96-97).

Complainant could not read the serial numbers from where he was standing, so he climbed up and stood on the bearings as he read the numbers, with one foot on the bearing of one motor and the other foot on the bearing of the other motor. (Tr. 97). He was under the impression that Paulsen and Geurells were doing the same thing, as he saw their heads on the other side. (Tr. 98). He had first looked around for a ladder in the immediate area and did not find one, but he admitted that he "didn't go out of [his] way to find one." (Tr. 99). Although Complainant noted that he had observed other workers standing on the Timken bearings, he acknowledged on cross examination that it was unsafe and he had violated a safety rule. (Tr. 148).

After getting the serial numbers, Complainant stepped down, and he saw Halverson, a manager for Union Pacific, who asked him why he had not used a ladder. He replied that he would go to get one, at which point Halverson told him that it was "too late for that" and they

[14] Other complaints he mentioned included Complainant allegedly sticking his hand in an assembly window, where the cylinder is, and Complainant allegedly not holding on when he put a step back together by a water tank on a GE locomotive, putting him at risk for being hit on the head when he tightened it. (Tr. 701).

would have to do something about it, because it was not acceptable. (Tr. 99-100). Within a minute, Mike Cook, senior manager for UP in the locomotive diesel shop, and Rob Rondish [later transcribed as Rongisch], another manager in the diesel shop, arrived on the scene and confronted him. (Tr. 100-01). They advised him that they were going to go upstairs and take his statement, proceed with disciplinary action, and then escort him off the property, and then they did so. (Tr. 101, 103).

Christopher Paulsen, a machinist for Union Pacific, a credible witness, was one of the two machinists working with Complainant at the time of the incident. (Tr. 667-69). At that time, he was working third shift, which went from midnight until eight in the morning. (Tr. 669). The job involved unloading new motors off the semi trailer, stacking them, loading the old motors on the trailer, and then getting the serial numbers and filing the paperwork. (Tr. 668, 670). There was a job briefing before the incident that all three of them attended, at which they specifically discussed getting "a ladder or step or something like that" in order to read the serial numbers. (Tr. 670-71). He explained that only the truck driver was allowed on the trailer due to liability issues, so they had to tell Complainant to get off the trailer based on shop policy, at which point he complied and said he had not been aware of that. (Tr. 671, 674). Paulsen did not witness Complainant standing on the bearings; however, he spoke with Halverson after the incident. (Tr. 675, 685). He stated that he did not believe it was safe to stand on two bearings and he had not done it himself in the past. (Tr. 678). When they finished the job, he was able to retrieve a ladder from one of the bays in less than five minutes. (Tr. 680-81).

Halverson testified that he was on the way to the parking lot at the end of his shift, at approximately 6:15 a.m. on September 15, 2009, when he observed Complainant standing on two axles/Timken bearings, with one food on one, and one foot on the other. (Tr. 609-17). At that time, Complainant made eye contact with him and started to get down. (Tr. 615-16). Complainant walked over to him and, when he asked Complainant why he didn't get a ladder, Complainant stated that he would get one. Halverson replied, "There's no need for that because I'm going to address this careless, carelessness to safety" and he told Complainant that he was going to make some phone calls and talk about what he witnessed Complainant doing, which he felt was "very unsafe." (Tr. 615-16). He explained that the bearings were round and smooth but did not spin freely, and they would be even more unsafe if a worker had oil or grease (which was prevalent in the area) on his shoes. (Tr. 616-17, 645, 662). Next, he called Rob Rongisch and Mike Cook, both senior managers, and Cook said they needed to talk to Thalken. (Tr. 618). At that point, because Thalken was not in his office, they went to the conference room, where Complainant filled out a statement. (Tr. 618-19). They then escorted him to his car. (Tr. 619).

Waalkens testified that he agreed that it was a violation to not use a ladder under the circumstances and it was an unsafe situation. (Tr. 275-76, 289). He testified that at the time of the incident, it was disorganized and ladders were strewn around the area. (Tr. 277). Waalkens never witnessed anyone standing on Timken bearings. (Tr. 284). Based on his experience, a single incident of that nature would not result in dismissal, however, and more serious infractions did not result in dismissal. (Tr. 285-87).

Termination

Within a couple of days of the Timken bearing incident, Complainant received a letter via certified mail notifying him of his dismissal. (Tr. 104). The letter was dated September 17, 2009 and was signed by David J. Thalken, Director System Locomotive Facility. (C10). It provided (in its entirety):

> I'm enclosing the Leniency Reinstatement Agreement dated September 10, 2009; copy attached. Under the terms of your reinstatement agreement you were to have no violation of various Company rules, including Rule 1.6 during your 18-month probationary period.
>
> As a result of your unsafe risk behavior standing on two free-rolling Timken bearings, you are in violation of the terms of your leniency reinstatement agreement and effective September 11, 2009 you are hereby returned to the status of dismissed employee.

(C10). Thus, Complainant was retroactively terminated. He consulted with the union representative, Mullen, who told him there was nothing more he could do and he was "done railroading." (Tr. 105, 204-05).

Aftermath of Termination

Complainant was out of work from September 17, 2009 until February 2011. (Tr. 109-110). He unsuccessfully sought employment with another railroad, Burlington Northern Santa Fe (BNSF) (Tr. 110-112, C67) and a railroad accident cleanup company, Hulcher Professional Services (Tr. 113-14). In October or November of 2010, he moved to Lincoln, Nebraska, because his wife's father lives there and they were unable to pay for their mortgage and utilities. (Tr. 115). The only job he held in Lincoln was for a month to a month and a half when he worked on trucks changing tires, doing brake jobs, and changing oil. (Tr. 115). He moved back to North Platte when OSHA ruled in his favor and he expected to be going back to work, in April or May of 2011. (Tr. 116). However, Union Pacific did not allow him to come back to work. (Tr. 118). He had to relocate in May 2012 because the foreclosure on his home was being formalized. (Tr. 117; C69, 70, 71). He worked for Love's Travel Stops, with a short stint at Modern Muffler, until January 2012, when he went to work for Firestone GCR as a tire technician for a service truck. (Tr. 118-20). Complainant offered his income tax returns for the years 2007 through 2009 and several W-2 forms and pay stubs as evidence of his earnings, and he also offered receipts for his expenses related to his search for employment. (C57-59, 60, 61, 63, 65, 66). Other expenses related to health insurance and rental of a storage unit for his belongings (because he expected the bank to foreclose and did not think he could leave them in his house.) (Tr. 132-34, 136-37). The foreclosure was started in July 2011, but the property was not actually sold until May 2012. (C69-71).

As a result of the termination, Complainant became upset and his temper was short, mainly with his wife. (Tr. 135). This was in contrast to the earlier days of his marriage, when

they got along well. (Tr. 135). He was also stressed out taking care of the children while his wife worked overtime. (Tr. 135-36). His son had just turned three, and his daughter was born in June of 2009. (Tr. 137). The situation was overwhelming, and he put on weight, eventually weighing up to 300 pounds. (Tr. 138-39). Once he started working again, it helped alleviate the stress. (Tr. 140). Likewise, despite the stresses in his relationship with his wife, their relationship was moving in the right direction and, since she obtained employment as a manager in an apartment complex, things were looking up financially for them. (Tr. 144-45).

Total Safety Culture

There was considerable testimony about the Total Safety Culture at Union Pacific. Perhaps the best definition of Total Safety Culture was provided by Mike Phillips, General Director of Labor Relations for Union Pacific:

> A. Total Safety Culture is an employee driven program whereby the employees take responsibility to monitor their own actions, and try to identify if there are at risk behaviors, and to take appropriate action to discuss with a person who might have possibly done some sort of action that might have jeopardized safety.
>
> And it does more than just that. It also, Total Safety Culture, the employees can identify issues or processes that are happening, and to make suggestions on how to improve those. My understanding of it, there are cards employees fill out when they make observations of other employees. They first have to have some training on how to do that. But after they've done that, they'll ask another employee can I do an observation of you doing some sort of work or task.
>
> And if the person says no, they're not supposed to do that. But if they do agree, then the person who is observing will observe and note whether there's any at risk behaviors of not.
>
> And then they give a copy of the card to the employee who's being observed and put a copy of the card in a box. And then there's one person who compiles that data. It's anonymous. So there's no person identified, so-and-so stepped on the rail or did something wrong. But it helps then when it's compiled to look for trends or other things that need to be addressed.
>
> And then the people who are involved in the Total Safety Culture groups then work to address those internally. It's employee driven.

(Tr. 835-36). Safety issues relating to individuals could be brought up at safety meetings as part of TSC, based upon cards filled out by employees, but no names were used. (Tr. 301-03 [Waalkens]). The cards were collected by a TSC facilitator, who was also responsible for promoting the process and looking for at risk behaviors.[15] (Tr. 444-45 [Thalken]). Phillips indicated that under the TSC program, a manager would not act on repeated complaints about an employee, because the goal of TSC was to have the employees themselves monitor their co-workers; however, he acknowledged that if the employee went to the manager, he would have acted outside of the TSC process. (Tr. 913-15).

[15] Mark Thompson was the Total Safety Culture Facilitator when Complainant was employed at the shop. (Tr. 445).

Complainant understood TSC as a way he and the other employees took care of people who might be acting unsafely, whether through a rule or policy violation, an "at risk behavior" or unsafe act, or a behavior that could cause injury to the worker or someone else. (Tr. 153-54). He described it as a way not only to make people safer but also to change behavior. (Tr. 212). He had taken advantage of the Total Safety Culture both to talk to other employees whom he thought were acting unsafely and, on a few occasions, other people took that opportunity with him (as they did when he was going to climb up on the trailer prior to the Timken Bearings incident). (Tr. 155). Complainant agreed that the policy was a good one and was well-intentioned. (Tr. 221).

Winchell, who had retired in December 2010, but who had worked for Union Pacific for 39 years prior to his retirement, testified that the TSC program had evolved to the point at which there was a focus on the number of audits as opposed to the results. (Tr. 345-54, 395). He attributed the change to Barry Kanuch, who had taken over from the former Chief Mechanical Officer, Joe Santa Maria, about ten years prior to the hearing. (Tr. 333, 349-52, 367-68). Thalken was the manager below Kanuch. (Tr. 368).

Policy on Reporting Injuries

Winchell also testified that he had noticed a change in the way management viewed accident reports. (Tr. 362-63). Initially, the attitude was that everybody could learn from reported incidents to make sure that it didn't happen again. (Tr. 363). System wide conference calls were conducted for safety discussions and anyone could call in. (Tr. 363-66, 371). However, Kanuch started making demeaning comments during the conference calls, when injuries or incidents were reported, and beginning in 2007 or 2008, a key card was required to participate. (Tr. 369-72). Winchell also testified: "Whenever there is a personal injury, the attitude now is that there was a rules violation of some kind or another with rare exception" and "there's going to be discipline." (Tr. 379-80).

Wright was not aware of managers at Union Pacific expressing a negative attitude toward employees turning in personal injury reports.[16] (Tr. 241-42). He also indicated that if he were injured, he would report the injury, as that was the policy and it was the honest thing to do. (Tr, 257-58).

According to Waalkens, Mike Halverson had little tolerance for injuries and at one time suggested that anyone who filed a personal injury claim should not be working for the railroad. (Tr. 277-78, 279-81). However, Waalkens agreed with Wright that under the rules, an injury is supposed to be reported, and he would report injuries. (Tr. 278).

Waalkens also testified that managers at Union Pacific would get bonuses based upon certain goals and measures, which could be impacted by the manager's FRA reportable rate

[16] Wright had actually been terminated in 2007 as a result of an investigation of an injury he sustained, because Union Pacific believed he had actually sustained the injury while off duty; however, he was reinstated following arbitration the following year. (Tr. 241-44, 245-47, 251-52.) In contrast to Complainant, Wright was on medical leave and was therefore in pay status while he pursued his appeal to the arbitration stage.

(relating to personal injuries in the diesel facility); however, non-reportable injuries were not included. (Tr. 282-83). Waalkens indicated that, in contrast, he was a supervisor and union member, and he received only base pay. (Tr. 282).

Dave Thalken, shop manager, whose testimony is discussed below, indicated that his compensation package was based in part on reportable injuries. (Tr. 578).

Employee Discipline

Labor Relations General Director Phillips testified that there was a continuing dialogue between his organization and the unions. (Tr. 831). Under the collective bargaining agreements between the company and the unions, the company is prohibited from disciplining employees without going through procedures that are outlined in the agreement, including the right to a hearing. (Tr. 831). The discipline policy (C17) was, however, adopted by Union Pacific without negotiation with the union. (Tr. 833-35). The Notice of Investigation that Complainant received (C8) was standard. (Tr. 835-39). At the hearing, the hearing officer questions on behalf of Union Pacific and the union representative questions on behalf of the employee. (Tr. 844-45). If an employee is disciplined after the hearing, the union can file a claim or grievance with the Labor Relations department, and if the parties were unable to reach a compromise, a third party arbitrator would render a decision. (Tr. 848-49). The arbitration award could also be appealed to federal court. (Tr. 849).

According to Winchell, a former union representative, almost any rule violation will be investigated, and the person who decided whether to go forward with an investigation would be the local officer, which in this case would be Thalken. (Tr. 322-23). To preside over the hearing, Union Pacific would select a presiding officer who was impartial, as for example someone from out of town. (Tr. 326-39).

Phillips explained that leniency agreements were collective bargaining agreements and it was typical for an offense that was not very serious to result in a level 3 disciplinary level and 18 months of probation, as was included in Complainant's agreement (C8). (Tr. 851-54). According to Phillips, the listed charges were not typical but he had seen them before. (Tr. 890). Complainant's probationary agreement only included future Rule 1.6 violations, so for any other type of violation, the usual procedures would control.[17] (Tr. 854). With respect to Coco, who ran over Complainant's foot, he explained that he received the same discipline as Complainant because the level 3 discipline he was already on was an attendance issue, and not safety related, and he had a different union representative who negotiated on his behalf. (Tr. 859-61). Phillips acknowledged that Labor Relations does not conduct an independent investigation prior to authorizing a charge to be filed and did not do so in Complainant's case. (Tr. 895-96). According to Phillips, neither Robert Moore (the general chairman of the union) nor Mullen (the union representative) complained about the way the process was applied to Complainant's case.

[17] A violation of Rule 1.6 could result in dismissal, according to the disciplinary policy. (C17). Phillips acknowledged that personal injury was included as a factor in assessing the level of discipline under the discipline calculation worksheet, but he indicated that it had been removed subsequently, "because we don't want to give someone the impression that we're doing something improper." (Tr. 919-20).

(Tr. 862, 875-76). Phillips' office did not have further involvement with Complainant's case until he "reverted to the status as a dismissed employee." (Tr. 864).

Testimony of David Thalken

David Thalken testified on behalf of the Respondent, and he also served as the Respondent's representative during the hearing. Although his testimony was generally credible, there were times at which I found him to be not credible and I questioned his veracity.

Thalken was the shop director for Union Pacific in North Platte, a position he held for 14 years, and he had been with the railroad a total of 39 years at the time of the hearing. (Tr. 428). Complainant was one of the employees in his shop. (Tr. 429). In the capacity of shop director, he was in charge of locomotive maintenance and had around 650 people, including eight managers, working for him. (Tr. 428-29). Thalken had replaced Barry Kanuch, who had replaced the previous shop director, Purvis Miller in 1997. (Tr. 434, 448-50).

Thalken testified that, prior to the adoption of the Total Safety Culture (TSC), there was a "top down approach to safety" that was rule driven and discipline driven; if someone broke a rule, it was investigated and he was held accountable. (Tr. 432). That system was not very effective as measured against reportable injuries (i.e., those that required medical attention and needed to be reported to the FRA), which were three to four percent. (Tr. 432-33). Thalken testified that the injury standard was about one percent. (Tr. 433). Since 1997, when the TSC employee-driven program was adopted, the FRA reportable rate had consistently dropped and was at 0.35 percent. (Tr. 434-45).

Thalken testified that a manager who observed an employee exercising a risk behavior could solve the problem by just talking to the employee and that "[a]s managers we like to use the process, as well, if we can do it non punitive" but that if a person continued to violate something or somebody reported a rules violation to management, they would have to address it through a disciplinary process. (Tr. 440). There were also weekly safety business meetings. (Tr. 452).

Thalken described the disciplinary process and explained that, if an employee were to have a hearing, he would review the transcript and he (not the hearing officer) would make the decision as to whether the facts supported the violation.[18] (Tr. 442). He also explained that, until a decision is made, the employee is not paid but, rather, is reimbursed if he ultimately prevails. (Tr. 442-43).

With respect to the parking lot incident, Thalken indicated that Jeff Smith, a GE director, came to him, distraught, the following morning and reported that there was a problem because a guy was standing talking on his cell phone and an electrician pulled in and ran over his foot.[19]

[18] Mullen, the union representative, was under the apparently erroneous impression that the hearing officer made the decision. (Tr. 773).

[19] This testimony was admitted over objection because, while not probative of the matter stated, it is relevant to the witness's state of mind in initiating the investigation. (Tr. 463). It is not probative to establish the truth of the matter stated by Smith (who did not testify, but who prepared an injury report, C3, discussed in footnote 20 below).

(Tr. 460). According to Thalken, Smith was upset about the carelessness on that night. (Tr. 461).[20] After hearing the facts from Smith, Thalken decided to set up a formal investigation and take both Petersen and Coco out of service pending the investigation. (Tr. 461).

This is the point at which I did not find Thalken to be credible, in his discussion of why he decided to charge both Complainant and Coco equally:

> Q Why as to those two employees, why do you take them out of service?
> A Well, they were both careless. And they both had the same rule violation. And we keep things consistent, you know. He was careless. We felt Brian was careless. So we took them both out of service pending the investigation.
>
> JUDGE LAKES: Could you explain that to me? For instance, getting run over, how can they be considered careless?
>
> THE WITNESS: Well in Brian's case, he was leaning against his car according to Mr. Smith, you know, texting or whatever. And the car pulled in.
>
> And he didn't, apparently didn't see him, the car pulling in, you know. I mean, everybody has peripheral vision. I mean, if you're looking at your phone and there's a car coming in, he definitely should have got out of the way. That's the way we felt.
>
> He should've stepped aside or got out of the way. I mean, he didn't take any action to try to avoid being run over.
>
> JUDGE LAKES: When Mr. Smith gave the account to you, he was blaming both of them equally?
>
> THE WITNESS: Yes. He felt that Brian and Mr. Coco were being careless, Brian for the fact that he didn't move out of the way when a car pulled in, and Mr. Coco for the fact he didn't try to avoid Mr. Petersen.

(Tr. 462-63.) Subsequently, Thalken indicated that he could have taken it into account in the notice and charges if he felt Coco were more at fault, but he charged them equally because he felt they were both being careless. (Tr. 464-65). Incredibly, even after hearing Complainant's and Wright's testimony indicating that Complainant had nowhere to go to avoid Coco's vehicle, Thalken still maintained that his decision to charge Complainant the same as Coco was reasonable and they were equally culpable.[21] (Tr. 562, 568). After assessing the substance of his testimony and his demeanor when he provided it, I do not find his explanation to be credible and I do not believe his testimony concerning his basis for charging Complainant after the parking lot incident to be truthful.

In any event, I did not find Thalken's testimony concerning the parking lot incident (and his understanding of what occurred and its significance) to be credible.

[20] Smith prepared a Manager's Report of Employee Personal Injury that appears as C3. It indicated "FAA" [first aid only] which was "not FRA reportable." (C3). Under "Event – Describe the Event or Circumstance that Caused the Injury," he wrote "Texting on Phone (did not see car coming), possible person par[k]ing car" and under "probable reason or cause," he wrote "awareness of surroundings." (C3).

[21] Thalken's explanation as to why Coco was not penalized because he was already on level 3 status due to absenteeism was garbled at best, and he ultimately deferred to a Labor Relations witness to explain it. (Tr. 560-62, 596-600). It also appears to be inconsistent with C17, the disciplinary procedures. His explanation as to why there was no investigation as to the fault of the machinists in causing Complainant's injuries during the crankcase incident was also unconvincing. (Tr. 530).

Thalken also testified that employees were removed from service and placed in nonpay status during an investigation for their own good, because they would be thinking about what might happen to them and it would put them at risk of getting hurt. (Tr. 556-57). That testimony did not ring true.

There were, however, other aspects of Thalken's testimony that I found to be credible. Thalken credibly testified that he discussed the need for safety during his future career with Complainant at the time he signed the Leniency Agreement and he was appalled when only a few days later, Complainant had a safety violation. (Tr. 477-79, 487-91). Thalken explained that it took him a long time to decide what to do but that it was his decision alone to terminate Complainant. (Tr. 490-92, 573-75). Complainant was ultimately dismissed because he violated his leniency agreement. (T. 592).

Prior Complaints about Complainant

Thalken also testified about a number of employees who came to him over the years to complain about Complainant taking shortcuts in his work and putting himself and others in danger, yet not a single rules violation was implicated. (Tr. 478-81, 503-05, 514-15, 558-60, 601-05). The only specific allegation he could recall related to Complainant allegedly placing his finger by a bolt hole (which did not occur according to Complainant's testimony, discussed above). (Tr. 520-21). Nevertheless, he determined, based upon these vague allegations, considered along with the Timken bearings incident, that Complainant would seriously injure himself if he continued to work for Union Pacific. (Tr. 572-74).

Thalken's testimony on that point was corroborated by Michael Halverson, locomotive manager for Union Pacific.[22] Halverson, who was a credible witness, testified similarly that reports about Complainant's unsafe acts were frequently made to him but they were not made in writing and were nonspecific, so he could not take any action; however, based upon these rumors, he too voiced concerns that Complainant could cause injuries to himself or others. (Tr. 634-40). The only unsafe behavior by Complainant that Halverson personally witnessed was the Timken bearings incident. (Tr. 633-34).

On cross examination, when asked about whether other workers had talked to him about doing things that were unsafe, Complainant acknowledged that they told him that he worked too fast, because he worked at a steady pace. (Tr. 148). However, the only actual safety violation that he admitted to was the Timken bearing incident. (Tr. 148-49). Although I believed his testimony, it still leaves open the possibility that he unknowingly committed one or more other safety violations.[23]

[22] Thompson and Mullen also discussed safety complaints made by other employees, as discussed above.

[23] For example, with respect to the pry bar incident that precipitated the safety meeting, Complainant was apparently under the impression that he was being criticized for the way he sat down when he used the pry bar to move the cradle or table when it became jammed, whereas Thompson testified that he should not have used the pry bar to move it into place; however, both Complainant and Thompson testified that others had used it in that manner in the past. (Tr. 106-07 [Complainant]; Tr. 689-90, 702-03 [Thompson]). That incident occurred after the leniency agreement was executed.

LEGAL BACKGROUND

FRSA Standard

The employee protection/whistleblower provisions of the FRSA prohibit covered employers from discharging, suspending, demoting, or otherwise retaliating against an employee because he notified, or attempted to notify, his railroad carrier or the Secretary of Transportation about a work-related personal injury. 49 U.S.C. § 20109(a)(4). To prevail, a complainant must demonstrate by a preponderance of the evidence that his protected activity was a contributing factor to the adverse action alleged in his complaint. 29 C.F.R. § 1982.109(a).[24] However, even if the complainant meets that burden, the complainant cannot prevail if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action even absent the protected activity. 29 C.F.R. § 1982.109(b).

In *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152 (3rd Cir. Feb. 19, 2013), the U.S. Court of Appeals for the Third Circuit noted that, as amended, the FRSA adopted the AIR21 burden shifting test:

> Under AIR–21, an employee must show, by a preponderance of the evidence, that "(1) she engaged in protected activity; (2) the employer knew that she engaged in the protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action." *Allen v. Admin. Review Bd.*, 514 F.3d 468, 475–76 (5th Cir. 2008). Once the plaintiff makes a showing that the protected activity was a "contributing factor" to the adverse employment action, the burden shifts to the employer to demonstrate "by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior." *Id.* § 42121(b)(2)(B)(ii). The Department of Labor has promulgated regulations that adopt this burden-shifting standard to FRSA complaints filed with the Department of Labor. See 29 C.F.R. § 1982.104(e)(3)-(4).

Araujo, supra, slip op. at 12 (footnote omitted). The Third Circuit explained that the term "contributing factor" was a term of art and meant "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Araujo*, slip op. at 14, *citing Ameristar Airways, Inc. v. Admin. Rev. Bd.*, 650 F.3d 563, 567 (5th Cir. 2011), *quoting Allen, supra.*

[24] To make out a prima facie case at the investigational stage of the proceedings, a complainant must show: 1) he/she engaged in protected activity; 2) the employer knew or suspected that the employee engaged in protected activity; 3) the employee suffered adverse action; and 4) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action. 29 C.F.R. § 1982.104(e)(2).

Procedural and Evidentiary Rules

The rules of practice and procedure and the rules of evidence for hearings before the Office of Administrative Law Judges appearing in 29 C.F.R. Part 18 are applicable to cases brought under the FRSA whistleblower provisions. 29 C.F.R. §1982.107.

DISCUSSION

Evidentiary Ruling

Initially, I reaffirm my ruling excluding the proffered transcript of the deposition of Cameron Scott taken in another proceeding (*Tanner*). Testimony from the deposition was offered as an admission of a party opponent.[25] See 29 C.F.R. §18.801(d)(2); Fed. Rule of Evidence 801(d)(2). I had excluded the deposition because it was not timely proffered, there was unfair surprise, and the issues were not the same at the time it was taken due to changes in the controlling precedent. In addition, to be fair, its admission would necessitate a reopening of the record for rebuttal evidence, including potential testimony. Likewise, it is of limited probative value as the issues in this case are not the same as in the prior case, which was brought by a different employee under the Federal Employers' Liability Act (FELA). At the hearing, I indicated that, if I were to allow the deposition testimony, I would issue an Order but, if not, my ruling would be set forth in my decision.

I have carefully considered the arguments of the parties and I find no reason to change my previous ruling. As Respondent has pointed out (in its brief in opposition to admission of the exhibit), the deposition involved a different complainant and a different statute; the case did not involve whistleblower issues; and the deposition was taken on April 3, 2007, prior to the amendments to the Federal Rail Act made on August 3, 2007. I agree that the deposition would have limited probative value. Moreover, there is no indication that Mr. Scott is unavailable to be a witness in this case, either by deposition or by live testimony. Although this is a bench trial, the record would have to be reopened to allow Respondent to call Mr. Scott as a witness (or call other rebuttal witnesses) if the deposition, or excerpts from it, were admitted, thereby delaying the resolution of this proceeding. Under these circumstances, the deposition of Mr. Scott from the *Tanner* FELA case (C48) is excluded. SO ORDERED.

Elements of the Present Claim

Essentially, Complainant alleges that Union Pacific retaliated against him for reporting his foot injury during the parking lot incident, which resulted in his being subjected to a leniency (probation) agreement, which in turn resulted in his termination based upon a single rule infraction that, standing alone, would have been insufficient to result in his termination. I find

[25] There has been no allegation that Mr. Smith was an officer or director of Union Pacific and it is unclear whether he was an "agent." See 29 C.F.R. §18.23(a)(3) ("The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or duly authorized agent of a public or private corporation, partnership, or association which is a party, may be used by any other party for any purpose.") See also Fed. R. Civ. P. Rule 32.

that Complainant has established that Union Pacific retaliated against him when it terminated him, in contravention of the FRSA.

Reporting injuries is protected under Section (a)(4) of the Act, which prohibits an employer from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee because he notified, or attempted to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury. 49 U.S.C. § 20109(a)(4).

Here, it is undisputed that Complainant notified Respondent Union Pacific of work-related injuries on August 28 or 29, 2009; as such, he engaged in protected activity under the Act.[26] (ALJ 1). Likewise, it is undisputed that Respondent was aware of this protected activity. (ALJ 1).

Next, there is no dispute that Complainant was terminated on September 17, 2009. (ALJ 1). His termination clearly constituted adverse action, as "discharging" an employee is specifically included as actionable under the FRSA. 49 U.S.C. § 20109(a)(4).

Thus, the crux of this case is whether Complainant's termination was causally related to his protected activity. For the reasons set forth below, I find that he has established by a preponderance of the evidence that it was causally related.

Causation Analysis

As noted above, in *Araujo*, the Third Circuit recently explained that the term "contributing factor" was a term of art and meant "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152 (3rd Cir. Feb. 19, 2013). The court further explained that this test was to be contrasted with the *McDonnell Douglas* burden-shifting framework and case law requiring that the factor be a "significant", "motivating", "substantial" or "predominant" factor; rather, to establish a contributing factor, an employee "*need not* demonstrate the existence of a retaliatory motive on the part of the employee taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action." *Araujo*, slip op. at 14-15, *quoting Marano v. Dep't of Justice*, 2 F.3d 1137, 1141 (3rd Cir. 1993). The court further noted that this tough standard was adopted in view of Congressional recognition of allegations suggesting that railroad safety management programs sometimes subtly or overtly intimidated employees from reporting on-the-job injuries and that the underreporting of railroad employee injuries has long been a particular problem. *Araujo,* slip op. at 16-17.

In *Vernace v. Port Authority Trans-Hudson Corp.,* ARB No. 12-003, ALJ No. 2010-FRS-18 (ARB Dec. 21, 2012), the Administrative Review Board affirmed an administrative law judge's finding that the Port Authority Trans-Hudson Corporation (PATH) violated the

[26] Although Complainant also reported the Crankcase injury, and that could also be deemed to constitute protected activity, its causal relationship to the termination is less clear. That injury did, however, set the stage for the way Complainant was perceived in the workplace.

employee protection provisions of the Federal Rail Safety Act when it retaliated against the employee for filing an injury report. In that case, PATH sent a charging letter to the employee, stating that on April 1, 2009, she "failed to exercise constant care and utilize safe work practices to prevent injury to yourself when you did not inspect a chair" before sitting on it. On appeal, the ARB rejected Respondent's argument that it had taken no disciplinary action against the employee and that it had sent the charging letter to her because she had failed to exercise constant care and utilize safe work practices to prevent injury to herself rather than because she reported an injury. On the latter point, the ARB noted:

> PATH unpersuasively challenges the ALJ's factual finding of causation by arguing that it initiated a disciplinary investigation only because of the allegedly unsafe use of a chair (sitting on it) and not because Vernace reported an injury. As the ALJ explained, this clever distinction ignores the broad and plain language of the statute and regulations. It also ignores FRSA's extensive legislative history citing the rampant practices of abuse and intimidation inflicted on railroad workers who reported or even attempted to report work injuries.

Vernace, slip op. at 3.

Here, too, Complainant has established that his reporting of injuries was a factor, which, in combination with another factor (a subsequent rule violation), resulted in the decision to terminate him. Specifically, he was placed on probation when another worker ran over his feet in the parking lot and he reported the injury to his feet and back. Despite the clear fault of the other worker, who had been driving at an excessive rate of speed and pulled very close to Complainant's car, Complainant was charged with the violation of five separate Rules and one policy (relating to cell phone use) as a result of the incident for failing "to be alert and attentive" and "to take precaution to avoid having [his] feet run over"; he was further advised that, if substantiated, the allegations would result in permanent dismissal (C8). Thus, as in *Vernace*, the Respondent here has argued that it was actually disciplining Complainant for not exercising care and not utilizing safe work practices to prevent injury, and that it was not disciplining him for reporting the injury. However, as in *Vernace*, "this clever distinction ignores the broad and plain language of the statute and regulations" and the "FRSA's extensive legislative history citing the rampant practices of abuse and intimidation inflicted on railroad workers who reported or even attempted to report work injuries." *Id.* Despite the citation to rules that were allegedly violated, the central reason for disciplining Complainant for the parking lot incident was that he failed to prevent his feet from being run over, i.e., he sustained an injury that he reported, thereby causing an investigation to be conducted.

As noted above, Complainant was actually dismissed for having his feet run over but was returned on a probationary basis when he signed the probation agreement (with the misnomer of "Leniency Agreement"). Under that agreement, he would be discharged if he were to violate a company rule (Rule 1.6), relating to matters including carelessness with respect to safety and negligence, within a probationary period. Complainant felt that he had no choice but to sign the agreement because he was the sole source of support for his family at the time and he was advised that his chances of prevailing on appeal were minimal by his union representative. As discussed above, the union representative did a poor job representing him and did not even

suggest that the employee who ran over his feet was more culpable than Complainant was. Under the terms of the Leniency Agreement, Complainant agreed to accept dismissal from service and was returned to employment on a probationary basis. (C9). Contrary to Respondent's argument, however, the Leniency Agreement was not a formal settlement and did not in any way affect his rights under the FRSA.

When Complainant violated the terms of this probation by committing another rule violation (standing on Timken bearings), which in and of itself would have been insufficient to justify a termination, he was terminated without the opportunity to contest the charge. Specifically, the letter he received advising him of his termination stated:

> I'm enclosing the Leniency Reinstatement Agreement dated September 10, 2009; copy attached. Under the terms of your reinstatement agreement you were to have no violation of various Company rules, including Rule 1.6 during your 18-month probationary period.
>
> As a result of your unsafe risk behavior standing on two free-rolling Timken bearings, you are in violation of the terms of your leniency reinstatement agreement and effective September 11, 2009 **you are hereby returned to the status of dismissed employee**. [Emphasis added.]

(C10). Thus, Complainant was "returned to the status of dismissed employee" resulting from his reporting of his injuries during the parking lot incident. It is therefore clear that the Complainant's reporting of his injuries was a contributing factor to his termination.

I specifically reject the position taken by Respondent that both Coco, the worker who ran over Complainant's foot, and Complainant, whose feet were run over, were equally culpable because they both violated safety rules.[27] This case does not involve a situation where an employee playing a video game walked into the path of a vehicle, demonstrating a reckless disregard for his own safety. Under a new cell phone policy (which did not appear in the rule relating to cell phone use), cell phones were not to be used in "red zones." There was conflicting evidence as to whether Complainant was in a red zone at the time of injury. Whether Complainant was technically in a red zone or not, he was checking his cell phone for business purposes, the practice was usual and accepted at the time, and he was leaning against his car within a parking space. Had he been aware of Coco's vehicle before it pulled into the parking space, the credible testimony establishes that he would not have been able to get out of the vehicle's path. Under these circumstances, Complainant was not in any way culpable in the parking lot incident, apart from a possible violation of a cell phone policy (as opposed to a rule).[28] However, even if that were not the case, it is clear that Respondent terminated

[27] Although Thalken stated that he found both to be equally culpable, the report filed by the supervisor at GE incredibly suggests that he assigned more blame to Complainant than to Coco. (C3) See footnote 20 above. Smith did not testify at the hearing but was interviewed by the OSHA investigator. (C45).

[28] Complainant did not actually violate the rule relating to cell phone use (C12), although he arguably violated a recent policy relating to cell phone use (C16), if the parking space is considered a red zone. There was conflicting testimony on the issue, as discussed above. However, there was no evidence showing what, if any, disciplinary action would result from violation of the cell phone policy (as opposed to the rule). Compare C12 with C16. As he was using the phone for business purposes, restrictions relating to personal use were not applicable.

Complainant at least in part because he was injured and he reported the injury.[29] That is precluded by the FRSA.

Examining the Rules that Complainant allegedly violated (C11 through C17) reflects that these rules are written in such a manner that anyone who is injured and reports it will have violated a least a part of one or more of them. For example, in pertinent part, Rule 1.1.2 (Alert and Attentive) requires that employees be careful to prevent injuring themselves or others; Rule 70.1 (Safety Responsibilities) requires that employees be responsible for their personal safety and take every precaution to prevent injury to themselves; Rule 70.5 (Protection of Body Parts) prohibits employees from placing any parts of their bodies (including feet) in a position "where they might be struck, caught, pinched or crushed";[30] Rule 1.6 (Part 1, Careless of Safety) relates to a rules infraction by employees that "demonstrates a willful, flagrant, or reckless disregard for the safety of themselves"; and Rule 1.6 (Part 2, Negligent) precludes behaviors or actions by an employee that "cause, or contribute to, the harm or risk of harm to the employee." As applied in this case, Complainant violated parts of these rules because he "may have failed to take precaution to avoid having [his] feet run over. . . resulting in [his] sustaining a possible injury to [his] feet and back." Thus, these Rules in effect punish an employee for being injured. Respondent cannot argue that Complainant was being disciplined for being injured as opposed to reporting the injury, because that is a distinction without a difference. *See Vernace, supra.*

Here, neither Complainant nor Coco would have been disciplined had Complainant not reported the injury. However, when he did so, he put into play procedures that ensured he would be charged with multiple rule violations.

In analyzing this issue, I do not find it to be significant that the injury was not reportable (i.e., in the category for which reporting was legally required) or that it occurred at a GE facility (i.e., at the premises of a contractor or subcontractor) where Complainant was working. Those factors do not affect Respondent's responsibility under the terms of the FRSA, as Complainant was acting within the scope of his employment with Respondent at all pertinent times. Rather, what is relevant is that there would clearly be a chilling effect on the reporting of injuries if railroads were permitted to discipline employees for not avoiding injury, as it did here. Preventing retaliation for the reporting of injuries is exactly the type of result the FRSA was designed to address. *See Araujo, supra; Vernace, supra*.

In short, I find that Complainant's reporting of his injury during the parking lot incident was a significant factor that contributed to his termination. It is not necessary to show evil motivation on the part of Respondent as long as the protected activity was a contributing factor to Complainant's termination, as it was here.

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[29] Inasmuch as there is direct evidence establishing a causal relationship, it is unnecessary to establish causation inferentially, based upon the temporal proximity between the Complainant's protected activity (reporting the injury) and his discharge. Thus, Respondent's argument in its Posthearing Brief that the temporal proximity should be ignored because it is only based on Complainant's unsafe work practices need not be addressed, other than to note that the Timken bearing incident did not sever the causal link between reporting the injury and termination. *See generally Evans v. Washington Public Power Supply System,* ALJ Case No. 1995-ERA-52 (ARB July 30, 1996) (*citing Williams v. Southern Coaches, Inc.,* ALJ Case No. 1994-STA-44 (Sec'y Sept. 11, 1995)). The unrefuted testimony establishes that, in and of itself, the Timken bearing incident would not be a basis for termination.

[30] The Rule does not mention parts of the body being run over. (C14).

Clear and Convincing Evidence

Respondent can still be relieved of responsibility if it can establish by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity; however, it has failed to do so. Rather, Respondent has offered no evidence establishing that it would have terminated Complainant in the absence of his protected activity.

While not defined in the statute, courts have characterized clear and convincing evidence as a heightened burden of proof – more than a mere preponderance of the evidence but less than evidence meeting the "beyond a reasonable doubt" standard. *Remusat v. Bartlett Nuclear, Inc.*, No. 1994-ERA-36 (Sec'y Feb. 26, 1996) *citing Yule v. Burns International Security Service,* No. 1993-ERA-12 (Sec'y, May 24, 1995). *See also White v. Turfway Park Racing Association,* 909 F.2d 941, 944 (6th Cir. 1990*), citing Street v. J.C. Bradford & Co.,* 886 F.2d 1472, 1479 (6th Cir. 1989). "Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'" *Brune v. Horizon Air Industries Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8 (ARB Jan. 31, 2006) slip op. at 14, n. 49, citing BLACK'S LAW DICTIONARY at 577.

There is no such evidence here. To the contrary, all of the evidence before me indicates that the Timken bearing incident, alone, would be insufficient to warrant a termination. Under Respondent's usual practices, had Complainant not already had a safety-related probation, he would have been offered a second chance. Likewise, there is no evidence showing that violation of the new cell phone policy applicable to the mechanical department (which is the only alleged violation not resulting from Complainant's being injured) would have warranted any kind of disciplinary action.[31] Thus, Respondent cannot meet its burden through clear and convincing evidence or, indeed, any evidence. Quite simply, if Complainant had not reported his injury, he would not have been fired.

The only other justification that Respondent has offered is vague testimony to the effect that Complainant was an unsafe employee who was the subject of complaints made by his coworkers, even though he was not actually accused of violating any rules. Was Complainant an unsafe employee? I have insufficient information in the record before me to answer that question. Certainly, much of the perception about his work resulted from the misreporting of the Crankcase incident. In that incident, according to Complainant, he was ordered by one of the machinists (for whom he was working as an apprentice) to retrieve an item from the crankcase while the other machinist turned on the switch from the other side, thereby causing him to be injured. I have 100% confidence that Complainant's version of that event was the correct one.[32] In any event, no evidence to the contrary was offered, apart from testimony indicating that

[31] The cell phone rule was clearly not violated. Rule 1.10: Games, Reading or Electronic Devices, C12.

[32] Respondent has suggested that Complainant was not credible because he couldn't remember whether he saw Coco weaving through the parking lot before he was hit, as he stated during the investigation. I do not find that to be a basis for discrediting his testimony. When a witness expresses uncertainty about events in the remote past, the uncertainty is consistent with a commitment to be truthful. Based upon my observation of him in the courtroom, I am convinced that Complainant did his best to accurately and truthfully testify as to what happened to the best of his recollection.

Complainant acquired the nickname "Crank Case" and a reputation for unsafe behavior as a result of the incident.[33] The testimony by Thalken and Halverson about complaints made to them was not probative, either, as none of the complaints by other workers indicated that any rules had been violated, and none of the allegations were investigated. Such vague evidence does not rise to the level of clear and convincing evidence.

Damages

The Act provides for the following damages and remedies:

> (d) REMEDIES.—
>
> (1) IN GENERAL.—An employee prevailing in any action under subsection (c) shall be entitled to all relief necessary to make the employee whole.
>
> (2) DAMAGES.—Relief in an action under subsection (c) (including an action described in subsection (c)(3)) shall include—
>
> (A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;
>
> (B) any backpay, with interest; and
>
> (C) compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.
>
> (3) POSSIBLE RELIEF.—Relief in any action under subsection (c) may include punitive damages in an amount not to exceed $250,000.

49 U.S.C. § 20109(d). Thus the intent of the statute is to make the employee whole through reinstatement, back pay, and compensatory damages, and punitive damages are also available in appropriate cases.

In *Bailey v. Consolidated Rail Corp.*, ARB Nos. 13-030, 13-033, ALJ No. 2012-FRS-12 (ARB Apr. 22, 2013), an administrative law judge's award of $4,000 in compensatory damages for pain and suffering (based on the finding that the emotional distress was not entirely due to the railroad's adverse action) and denial of punitive damages was challenged by the complainant. On appeal, the Administrative Review Board found that the award of compensatory damages and denial of punitive damages were supported by substantial evidence.

[33] Mullen testified as to the account given to him by the two machinists, which (as discussed in footnote 12 above) made no sense, and I did not find Mullen to be a credible witness. In any event, while relevant to the state of mind of the witness, Mullen's account of what he was told has no probative value as to the truth of the matter stated as it is hearsay and does not fit any of the exceptions or have any other indicia of reliability. *See, e.g.*, 29 C.F.R. §18.801 *et seq.*

Reinstatement

Under the FRSA, a prevailing employee is entitled to reinstatement with the same seniority status that the employee would have had, but for the discrimination. 49 U.S.C. § 20109(d)(2)(A). Reinstatement is the preferred remedy. Notwithstanding his reservations concerning whether he "feels protected enough to go back" to work, Complainant has indicated in his brief that he still seeks reinstatement. *Complainant's Initial Post-Hearing Brief* at 25. He is therefore reinstated, to be returned to work as soon as practicable. In no event shall union representative Jerry Mullen participate in the process of reinstatement as he demonstrated at the hearing before me that he was unwilling or unable to act in Complainant's best interest.

Back Pay

Under the FRSA, a prevailing employee is entitled to "backpay, with interest." 49 U.S.C. § 20109(d)(2)(B). Complainant is therefore awarded back pay from the time of his termination, with interest. Inasmuch as there has been no bona fide offer of reinstatement, back pay shall continue until he is reinstated. However, back pay shall be reduced by his actual earnings during the period.

As a general rule, a back pay award should be based on the earnings Complainant would have received but for the termination. *See generally Blackburn v. Metric Constructors, Inc.*, 1986-ERA-4 (Sec'y Oct. 30, 1991)). Back pay generally extends until an employer has made a bona fide offer of reinstatement. *See Michaud v. Assistant Sec'y of Labor for OSHA*, ARB No. 97-113, ALJ No. 1995-STA-29 (ARB Oct. 9, 1997) *rev'd on other grounds sub nom. BSP Trans, Inc. v. United States Dept. of Labor*, 160 F.3d 38 (1st Cir. 1998)) (citing *Ford Motor Co. v. EEOC*, 458 U.S. 219, 241 (1982)). Complainant has the burden of establishing the appropriate amount of back pay. *Pillow v. Bechtel Construction, Inc.*, 1987-ERA-35 (Sec'y July 19, 1993). However, because back pay promotes the remedial purpose of making the victims of discrimination whole, courts have recognized that unrealistic exactitude is not required in calculating damages, and uncertainties regarding what an employee would have earned but for the retaliation should be resolved against the employer. *See generally EEOC v. Enterprise Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 587 (2d Cir. 1976), *cert denied*, 430 U.S. 911 (1977), quoting *Hairston v. McLean Trucking Co.*, 520 F.2d 226, 233 (4th Cir. 1975).

Complainant was out of work until February 2011 and has been employed at lower earning wages subsequently. I find that Complainant made reasonable efforts to look for work and has taken adequate steps to mitigate his damages.

Complainant's earnings with Union Pacific prior to his termination were as follows:

2007	$23,491
2008	40,856
2009	45,172 [through September 11, 2009]

(C57-59). According to Complainant, his earnings in 2009 were higher as he was working significant amounts of overtime. (Tr. 141-42). Complainant's wages for the final year of his employment would be the best measure for determining the earnings Complainant would have received but for the termination. If Complainant's wages for 2009 were extrapolated for the entire year, his yearly earnings would amount to $60,000. There was no evidence on the issue of whether Complainant would have been able to work as much overtime during the remainder of the year (although he clearly sought overtime whenever it was available and was doing so at the time of the parking lot incident). On the other hand, Complainant would likely have worked some overtime. Based upon his earnings in 2008, he would have earned approximately $10,000 during the final quarter of the year. Accordingly, for purposes of his average weekly wage, I will use a figure of $55,000 (based upon earnings of $45,000 for the first three quarters of the year and $10,000 for the final quarter.)

Complainant also submitted evidence of his earnings following his termination. He did not receive any earnings in 2010, except for unemployment compensation. (Tr. 127). In 2011, in addition to unemployment compensation, he received a total of $15,250 for three jobs at Modern Muffler, Loves Travel Stops, and Nickel Enterprises/Jim's Diesel Repair. (C62; Tr. 127-28). For 2012, his earnings at Bridgestone (Firestone GCR) from February 4 through April 21, 2012 (slightly less than three months) amounted to $6,753. (C63, Tr. 128-29). He testified that he was paid at a rate of $12 hourly and $18 hourly for overtime. (Tr. 129). Extrapolating his actual earnings for an entire year would amount to approximately $27,000, meaning that the back pay would be $28,000 for that year ($55,000 minus $27,000). However, as he was not employed in January, the earnings to be used for 2012 should be $24,750 ($27,000 yearly wages minus one month of wages at $2,250) or back pay in the amount of $30,250 ($55,000 minus $24,750).

Based upon the above, back pay should amount to the following, plus interest:

2009	$10,000 for final quarter
2010	$55,000
2011	$39,750 [$55,000 minus $15,250]
2012	$30,250 [$55,000 minus $24,750]
2013	$28,000/12 times number of months before reinstatement

Thus, back pay amounts to $135,000, plus interest, for the period from the date of Complainant's termination through 2012. For 2013, if Complainant were to be reinstated on September 30, the past wages would amount to $21,000 ($28,000/12 times 9). If Complainant is not reinstated, past wages will continue to accrue at the rate of $28,000 yearly, plus interest.

As noted above, the FRSA specifically provides for "backpay with interest." 49 U.S.C. § 20109(d)(2)(B). This includes pre-judgment interest on any accrued back pay, as well as post-judgment interest for any period between the issuance of this Decision and Order and the payment of the award. Interest is calculated using the rate that is charged for underpayment of federal taxes under 26 U.S.C. § 6621(a)(2). Interest shall be calculated at the time of payment.

Other Compensatory/Special Damages

The FRSA is intended to make an employee who has been retaliated against for engaging in protected activity "whole." It specifically provides for "compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees." 49 U.S.C. § 20109(d)(2)(c).

Although the testimony of health professionals can strengthen a complainant's case for compensatory damages, it is not required. *Jones v. EG&G Defense Materials, Inc.*, ARB No. 97-129, ALJ No. 1995-CAA-3 (ARB Sept. 29, 1998) (citing *Busche v. Burkee*, 649 F.2d 509, 519 n.12 (7th Cir. 1981), *cert denied, Burkee v. Busche*, 454 U.S. 897 (1981).) Rather, a complainant need only show that he "experienced mental and emotional distress and that the wrongful discharge caused the mental and emotional distress." *Jones, supra* (citing *Blackburn v. Martin*, 982 F.2d 125, 131 (4th Cir. 1992)). Nonetheless, a complainant must prove the existence and magnitude of emotional distress with "competent evidence." *Smith v. Esicorp, Inc.*, ARB No. 97-065, ALJ No. 1993-ERA-16 (ARB Aug. 27, 1998) (citing *Carey v. Piphus*, 435 U.S. 247, 264 n.20 (1978)). Furthermore, the severity of the retaliation is relevant in determining the appropriate amount of compensatory damages owed. *Smith, supra.*

Complainant has sought $200,000 for the pain and suffering that he experienced as a result of his termination and additional (unspecified) amounts for out-of-pocket expenses resulting from his termination.

Although there was no medical testimony, Complainant credibly testified about the profound effect his termination in September 2009 had on his marriage and his financial situation. In that regard, Complainant credibly testified about the extreme stress he experienced as a result of his termination, which came at a particularly difficult time for him, as his wife had just given birth, he had another small child, and he was the sole source of support for his family. Due to the economy, he had a difficult time obtaining other employment despite his significant efforts. He had to relocate and move in with his in-laws in order to make ends meet. His relationship with his wife suffered and he put on weight, eventually weighing over 300 pounds. He would have gone to marriage counseling but was unable to afford it. In addition, Complainant valued his job at the railroad and his plans to become a machinist were derailed. Although he moved back to North Platte after the OSHA decision ordering him reinstated in April 2011, Respondent did not reinstate him and instead appealed the decision to the Office of Administrative Law Judges. In July 2011, the foreclosure process on Complainant's home began, with the sale of his property taking place in May 2012 – an event that he had expected earlier, when he was initially terminated. (C69-71; Tr. 132-37). Ultimately, Complainant was able to find work at a lower rate of pay and his wife was also able to work and move into a responsible position.

As noted above, Complainant has also sought reimbursement for expenses relating to his job search, furniture storage, relocation, medical, and other out-of-pocket expenses, most of

which are neither itemized nor supported by receipts.[34] He testified in general terms about these expenses. I will not seek to enumerate these expenses separately as, apart from a few receipts totally less than $200, there is no competent evidence of the amount of these expenses before me.

In view of the above, Complainant is awarded special and non-pecuniary damages in the amount of $50,000 for the period through the date of the OSHA decision in April 2011, and an additional $25,000 for the period from the date of the OSHA decision until the present.[35] Had Respondent reinstated Complainant back in early 2011, he likely could have avoided foreclosure of his home and much of the emotional turmoil and embarrassment that he subsequently experienced. I find that, under the specific circumstances of this case, Complainant is entitled to damages in the amount of $75,000 for his out-of-pocket expenses, pain and suffering, and related expenses.

I find that $75,000 is an adequate amount to compensate Complainant for this entire category of damages from the time of the termination until the present, and the out-of-pocket expenses are subsumed within the $75,000 award, except for attorney's fees and costs, which will be the subject of a supplemental Order.

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[34] Apparently these damages were itemized before OSHA, as the OSHA decision of April 8, 2011 awarded $17,166.43, of which $10,000 was for pain and suffering and the remainder for out-of-pocket expenses. As this proceeding is de novo, those findings are superseded.

[35] In making my determination, I have considered the cases cited in Complainant's Initial Post-Hearing Brief at pages 27 through 32. In a recent case, I awarded damages in the amount of $10,000 for mental anguish and suffering; however, in that case, much of the damage suffered by the complainant was due to either her husband's contemporaneous termination or a hostile work environment claim that I found not to be actionable. See *Gunther v. Deltek, Inc.*, ALJ No. 2010-SOX-00049 (ALJ June 5, 2013) (Supp. Decision and Order Awarding Damages) (appeal pending). I have also considered the following cases:
Van der Meer v. W. Ky. Univ., ARB No. 97-078, ALJ No.1995-ERA-38 (ARB Apr. 20, 1998) (awarding $40,000 for humiliation after the respondent made a statement to a local newspaper questioning the complaint's mental competence); *Creekmore v. ABB Power Sys. Energy Servs., Inc.*, 1993-ERA-24, (Sec'y Feb. 14, 1996) (awarding $40,000 for emotional pain and suffering when complainant showed that layoff caused emotional turmoil and disruption of family because he had to accept temporary work away from home and suffered humiliation in having to explain why he had been laid off after 27 years with one company); *Michaud v. BSP Transp., Inc.*, ARB No. 97-113, ALJ No. 1995-STA-29 (ARB Oct. 9, 1997) (awarding $75,000 where report from a licensed social worker and psychiatrist showed that complainant suffered from major depression and where there was also evidence that the complainant had lost a lot of money in savings and lost his home in foreclosure); *Smith v. Littenberg*, 1992-ERA-52 (Sec'y Sept. 6, 1995) (awarding $10,000 for mental and emotional distress when psychiatrist attested that complainant was depressed and had post-traumatic problems); *Dutkiewicz v. Clean Harbors Envtl Servs., Inc.*, ARB No. 97-090, ALJ No. 1995-STA-034 (ARB Sept. 23, 1997), slip op. at 6, *aff'd on other grounds,* 146 F.3d 12 (1st. Cir. 1998) (affirming award of $30,000 based on severe emotional distress due to relocation, concerns for family's survival, difficulties with marriage, and ongoing peptic ulcer disease); *Murray v. AirRidge, Inc.*, ARB No. 00-045, ALJ No. 1999-STA-034 (ARB Dec. 29, 2000) (affirming "modest award" of $20,000 when complainant gained weight from depression and stress, had trouble sleeping, and had damaged self-esteem); *Jackson v. Butler & Co.*, ARB Nos. 03-116, 03-144, ALJ No. 2003-STA-026 (ARB Aug. 31, 2004) (affirming finding of $4,000 for emotional distress even though testimony was unsupported by professional counseling or medical evidence); *Lederhaus v. Paschen*, 1991-ERA-13 (Sec'y Oct. 26, 1992) (awarding the complainant $10,000 for mental distress when he was unemployed for five and a half months, foreclosure proceedings were initiated on his house, bill collectors harassed him and his wife at her job and her employer threatened to lay her off, and his family life was disrupted); *Smith v. Esicorp*, ARB No. 97-065, 1993-ERA-16 (Aug. 27, 1998) (awarding $20,000 when complainant did not lose his job or incur financial losses but there was evidence of emotional injury based on his own testimony).

Attorney's Fees and Costs

In the proceedings before it, OSHA awarded attorney's fees and costs in the amount of $16,776 for the period during which this case was before OSHA. If the parties agree, I can adopt that finding and incorporate it in my attorney fee award. However, as these proceedings are de novo, those fees are also subject to challenge absent the agreement of the parties.

Complainant's counsel shall submit a fully supported petition for attorney's fees and bill of costs, for work performed before this tribunal within 30 days of the date of this Decision and Order. Any challenges to the fee petition shall be submitted within 30 days of the date that the fee petition is filed. These periods are subject to extension by stipulation.

Punitive Damages

The FRSA specifically allows for punitive damages in an amount not to exceed $250,000 as "possible relief." 49 U.S.C. § 20109(d)(3). Punitive damages may be assessed in whistleblower cases to punish wanton or reckless conduct and to deter such conduct in the future. *See Johnson v. Old Dominion Security*, 1986-CAA-3,4,5, (Sec'y May 29, 1991). *See also BMW v. Gore*, 517 U.S. 559, 568 (1996). In determining whether punitive damages are appropriate, factors to assess include the degree of the respondent's reprehensibility or culpability; the relationship between the penalty and the harm to the victim caused by the respondent's actions; and the sanctions imposed in other cases for comparable misconduct. *See Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 523 U.S. 424, 434-35 (2001).

In its April 8, 2011 Findings in the instant case, OSHA awarded punitive damages in the amount of $75,000. However, as these proceedings are de novo, that finding is no longer in effect.

Even though I have handled multiple whistleblower cases since I began employment with the Office of Administrative Law Judges in 1994, I have never awarded punitive damages before. However, the actions by Union Pacific have been so egregious in this case, and Union Pacific has been so openly blatant in ignoring the provisions of the FRSA, that I find punitive damages are necessary to ensure that this reprehensible conduct is not repeated. Indeed, it would be difficult to envision a case that reveals a more blatant disregard for the whistleblower provisions of the FRSA than the instant case, which involves retaliation against an employee for reporting that his feet were run over while he was leaning against his car in a parking lot. The position taken by Respondent in the instant case is troubling, to say the least, and involves an egregious degree of culpability.

As I have never awarded punitive damages before, I have looked at the decisions of my colleagues in similar cases. Looking at the FRSA in particular, the following decisions recently awarded punitive damages, in the following amounts:[36]

[36] I have not taken into consideration any subsequent history in these cases. Rather, I am using them as a guideline with respect to the magnitude of punitive damages awarded at the administrative law judge level.

(1) *Vernace v. Port Authority Trans-Hudson Corp.*, ALJ No.2010-FRS-0018 (ALJ Timlin, Sept. 23, 2011) ($1,000 in punitive damages for two-day suspension).
(2) *Anderson v. Amtrak,* ALJ No. 2009-FRS-0003 (ALJ Berlin, Aug. 26, 2010) ($100,000 in punitive damages in light of conscious disregard of statutory obligations).
(3) *Santiago v. Metro-North Commuter Railroad Company, Inc.,* ALJ No. 2009-FRS-0011 (ALJ Geraghty, May 16, 2013) ($40,000 in punitive damages when railroad showed reckless indifference and disregard for its responsibilities under the FRSA).
(4) *Rudolph v. National Railroad Passenger corp. (Amtrak),* ALJ No. 2009-FRS-0015 (ALJ Stansell-Gamm, March 14, 2011) (punitive damages of $5,000 where there was a threat of disciplinary action).
(5) *Cain v. BNSF Railway Company,* ALJ No. 2012-FRS-0019 (ALJ Solomon, Oct. 9, 2012) ($250,000 in punitive damages where, inter alia, management employees conspired to defeat an employee's right to submit a medical claim and deprive him of his job).
(6) *Griebel v. Union Pacific Railroad Company,* ALJ No. 2011-FRS-0011 (ALJ Sellers, Jan. 31, 2013) ($100,000 in punitive damages when employee was discouraged from filing an injury report or to consult with an attorney and was threatened to be charged with dishonesty for doing so).
(7) *Smith v. Union Pacific Railroad Company,* ALJ No. 2012-FRS-0039 (ALJ Romero, April 22, 2013) ($25,000 punitive damages against railroad and $1,000 against supervisor when conduct was "egregiously reprehensible.")

Thus, reviewing the above cases, the punitive damages awarded ranged from $1,000 to $250,000. The lower amounts generally appear to relate to cases in which the discipline against the employee was minimal (a short suspension or warning) whereas (in general) the larger awards are in cases, such as the instant case, involving a termination coupled with culpable conduct. I find that the amount of $100,000 is in line with the above decisions and is an adequate amount to send a message to Respondent without being unduly burdensome.

Taking into account the reprehensibility of Respondent's conduct in this case (which was egregious, as discussed above), the harm to Complainant that resulted from Respondent's conduct (termination and associated damages), and the sanctions imposed in similar cases (and specifically the FRSA cases discussed above), Complainant is awarded punitive damages in the amount of $100,000.

CONCLUSION

After carefully reviewing the evidence of record and the parties' arguments, I find that Complainant has established that his protected activity (reporting a work-related injury) was a significant contributing factor to the adverse action taken against him (his termination). I also find that Respondent has failed to establish by clear and convincing evidence that it would have terminated Complainant in the absence of protected activity. I further find that Complainant is entitled to reinstatement, back pay with interest extending from the time of termination until reinstatement, compensatory damages in the amount of $75,000, and punitive damages in the amount of $100,000.

ORDER

IT IS HEREBY ORDERED that Complainant's claim for benefits under the FLRA be, and hereby is, **GRANTED**; and

IT IS FURTHER ORDERED that Respondent shall reinstate Complainant with full seniority; pay him back pay as set forth above; and pay him compensatory damages in the amount of $75,000, punitive damages in the amount of $100,000, and attorney's fees and costs (which will be the subject of a supplemental order); and

IT IS FURTHER ORDERED that Complainant's counsel shall submit a fee petition and bill of costs within thirty (30) days of the date of this Order, and Respondent shall have thirty (30) days to file any objections, provided, that those periods may be extended by stipulation.

Digitally signed by Pamela Lakes
DN: CN=Pamela Lakes,
OU=Administrative Law Judge, O=Office
of Administrative Law Judges,
L=Washington, S=DC, C=US
Location: Washington DC

PAMELA J. LAKES
Administrative Law Judge

Washington, D.C.

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).

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, the Associate Solicitor, Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(a).

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

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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

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).

The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board. 29 C.F.R. § 1982.109(e). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board unless the Board grants a motion by the respondent to stay that order based on exceptional circumstances. 29 C.F.R. § 1982.110(b).