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Issue Date: 11 July 2012

CASE NO.: 2011-FRS-38

In the Matter of:

NICK PFEIFER,
Claimant

v.

UNION PACIFIC RAILROAD COMPANY,
Employer

Counsel for the Complainant:
BRADFORD C. KENDALL, Esq., and
RICHARD D. HOLTSCLAW, Esq.

Counsel for the Respondent:
TORRY N. GARLAND, Esq., and
GREGORY F. MAHER, Esq.

Before:
RICHARD A. MORGAN, Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

PROCEDURAL BACKGROUND

This case arises out of a complaint of discrimination filed by Mr. Nick Pfeifer ("Complainant") against the Union Pacific Railroad Company ("Respondent," "Union Pacific" or "UP"), pursuant to the employee protection provisions of Section 20109 of the Federal Rail Safety Act, 49 U.S.C. § 20109 ("the Act"), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L. No. 110-53 and as implemented by federal regulations set forth in 29 CFR § 1979.107 and 29 CFR Part 18, Subpart A. The Act prohibits railroad carriers engaged in interstate commerce from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee or otherwise discriminating against any employee because of the employee's "reporting, in good faith, a hazardous safety or security condition." 49 U.S.C. § 20109 (b) (1).

On September 9, 2010, the complainant filed a whistleblower complaint with the Occupational Health and Safety Administration ("OSHA") contending that Union Pacific retaliated against him for reporting rough track, on July 3, 2010, on UP's Safety Hotline. The retaliation was allegedly in the form of a threat of Level-2 discipline for not having called the report in to a dispatcher, a manager's threats to adjust his (the manager's) schedule and see Mr. Pfeifer in the field, and harassment through increased FTX testing. The complainant amended his complaint on November 26, 2010, to include: the discipline for the October 20, 2010 infraction of UP's rules, which resulted in a five-day suspension without pay; and, continued increased testing. (EX AQ).

After investigating, the Assistant Secretary made findings, dated August 22, 2010, that:

- The Complainant engaged in protected activity, under the Act, when he reported rough track on four occasions in July and August 2010;
- The Respondent had direct knowledge of his protected activities;
- The Complainant suffered adverse employment actions; and,
- The Complainant's protected activities were a contributing factor in the adverse actions.

(ALJ EX I).

The Respondent submitted timely objections to the Findings on September 16, 2011. (ALJ II).

A hearing was held by the undersigned, March 27 through March 29**,** 2012, in Kansas City, Kansas, pursuant to Notices of Hearing issued on October 5, 2011 and February 22, 2012. At the hearing, multiple exhibits were admitted into evidence, as further described herein. Both parties filed post-hearing briefs.[1]

ISSUES

1. Does Union Pacific Railroad Company qualify as a railroad carrier engaged in interstate commerce? (TR 7).

2. Whether the Complainant was an employee of the Respondent, Union Pacific Railroad Company, on the dates of the alleged protected activity? (TR 7).

[1] Complainant filed a motion for leave to file a response to Respondent's post-hearing brief on July 9, 2012. Having considered the motion, Complainant's request is denied. The following abbreviations will be used as citations to the record: ALJ X – Administrative Law Judge Exhibits; CX – Complainant's Exhibits; EX – Respondent's Exhibits; and, TR – Transcript of the Hearing.

3. Whether the Complainant engaged in protected activity under the FRS, on occasions between June 2010 and mid-August 2010, or some other established date, that is, was he, or persons acting on his behalf, about to provide or did provide their employer or the Federal Government information relating to any alleged or actual violation of any federal law relating to railroad carrier safety or security?[2] (TR 7).

4. If the Complainant engaged in protected activity as an employee of the Respondent whether the Respondent was aware of the protected activity? (TR 7-8).

5. Did the Complainant suffer unfavorable personnel actions, i.e. was he discriminated against in respect to compensation, terms, conditions, or privileges of employment, i.e.,

(a) When Mr. French, a manager, threatened him with Level 2 discipline for using the company hotline rather than immediately report rough track to the dispatcher?

(b) When he was issued a Level 3 discipline and made to serve a 5-day suspension between 11/13-11/18/ 2010 for failing an October 20, 2010 FTX test?[3]

(c) When he was given an October 27, 2010 written Notice of Investigation related to a field test conducted on October 20, 2010?[4]

(d) When he was issued a Level 3 discipline or rule violation, on November 12, 2010, for the October 20, 2010 failure to log end-of-track-authority? (TR 8). and,

(e) When he was subjected to FTX testing after his Safety Hotline reports? (TR 287).

6. If the Complainant had engaged in protected activity as an employee of the Respondent and the Respondent was aware of the protected activity, did the protected activity contribute, in part, to the decision by the Respondent to discipline Mr. Pfeifer, i.e., was it a factor which, alone or in connection with other factors, tended to affect in any way the outcome of the decision? (TR 8).

7. If the Complainant established a *prima facie* case of a violation of the employee protection provisions of the FRS, whether the Respondent demonstrated, by clear and convincing evidence, that it would have disciplined Mr. Pfeifer, even in the absence of the protected activity? (TR 8-9).

8. If the Respondent presented clear and convincing evidence of a legitimate motive for disciplining Mr. Pfeifer, whether the Complainant can establish by a preponderance of the evidence that the Respondent retaliated against him for engaging in protected activity, i.e., that the Respondent's stated legitimate reasons were a pretext? (TR 9).

[2] Respondent's counsel agreed the Safety Hotline reports constituted "protected activity." (TR 539).
[3] Respondent's counsel agreed this was an adverse personnel action. (TR 539).
[4] The NOI, resulting in the suspension, was the result of Mr. Pfeifer's failure to properly complete his conductor's log related to end-of-track-authority FTX test, on October 20, 2010. (CX 6).

9. If the Complainant established the elements of his claim, what injuries, if any did he suffer? (TR 9).

10. If the Respondent violated the Act, what are appropriate compensatory damages, costs and expenses and what further relief, if any, (i.e., reinstatement, compensation, terms, conditions and privileges of employment, abatement orders) should be ordered?

11. If the Respondent violated the Act, are punitive damages appropriate ($250,000)?

STIPULATIONS[5]

Union Pacific Railroad Company qualifies as a railroad carrier, as defined by the Act, subject to 49 U.S.C. Section 20109. (ALJ EX III).

Union Pacific Railroad Company maintains a place of business in Kansas City, MO.

The Respondent and its employees were, at times relevant to this case, governed by the terms of a Collective Bargaining Agreement.

Union Pacific Railroad Company the complainant on May 17, 2004 to work as a locomotive conductor.

The Complainant worked at the Respondent's Neff Yard, in Kansas City, MO, which is part of its Kansas City Service Unit ("KCSU").

The Complainant, during the period in question, was a local chairman with the United Transportation Union, Local 1409.

The Complainant was an employee of the Respondent, Union Pacific Railroad Company, (conductor) on the dates of alleged protected activity. (ALJ EX III).

The Respondent maintains a Safety Hotline for the reporting of safety concerns. All complaints on the hotline are documented, assigned to a specific manager for resolution and the resolution of the complaint is documented in order to close-out the complaint.

Rough track is a hazardous safety condition.

[5] Administrative Law Judge Exhibit ("ALJ EX") III. ALJ EX I is the Secretary's Findings. ALJ EX II Respondent's Objections to the Secretary's Findings.

Making a report of a hazardous safety condition in good faith is a protected activity pursuant to 49 U.S.C. Section 20109(b) (1) (a). (ALJ EX III).

The Complainant reported rough track on the Respondent's Safety Hotline on July 3, 2010, July 13, 2010, July 28, 2010, and August 8, 2010.[6]

Respondent's Managers of Operating Practices Mr. Monte Albrecht, Mr. Skeeter French, and Director of Operations, Mr. Kevin Pratt, learned of the Complainant's July 3, 2010, Safety Hotline report no later than July 12, 2010. (ALJ EX III).

During the period of his employment, between July 3, 2010 and December 31, 2010, the Complainant was field tested ("FTX") on August 4, 2010, August 10, 2010, twice on August 12, 2010, August 17, 2010, September 8, 2010, September 11, 2010, September 26, 2010, October 20, 2010, October 21, 2010, November 29, 2009, and December 5, 2009.[7] (ALJ EX III).

The Complainant's field test evaluation records indicate that he was coached on August 4, 2010, twice on August 12, 2010, August 17, 2010, September 11, 2010, September 26, 2010, and October 20, 2010. (ALJ EX III).

In accordance with the Respondent's discipline policy, the Complainant was given a written Notice of Investigation for an investigative hearing for a possible Level 3 violation. (ALJ EX III).

The Respondent conducted a disciplinary investigation of the Complainant on November 3, 2010. (ALJ EX III).

The Complainant filed his first FRS complaint with the Department of Labor, on September 9, 2010, alleging Respondent discriminated against him in violation of the FRSA. (CX 1; TR 472).

The complaint was timely filed.

On November 12, 2010, the Respondent issued a Level 3 discipline (for a Rule 1.47A violation i.e., failure to document the end of the locomotive's authority to be on the main line on October 20, 2010, to the Complainant and he was directed to serve a five-day suspension without pay, which he served, between November 13-November 18, 2010.

[6] The original complaint referenced a rough track report by Mr. Pfeifer, on September 3-4, 2010, but evidence was not introduced to establish it. (CX 1).
[7] Field Train and Exercise ("FTX"). (TR 305).

The suspension resulted in a loss of $2,170.79 pay for the Complainant. (TR 14).

The Complainant amended his DOL complaint on November 26, 2010.[8] (TR 14, 472; EX AQ).

The Complainant timely filed a request for this hearing. (TR 14).

(TR 10-15 and ALJ EX III).

EVIDENCE[9]

Mr. Nick Pfeifer was hired by the Union Pacific Railroad Company, on May 17, 2004, to work as a locomotive through-freight conductor. He is a union member and the local chairman of the United Transportation Union, Local 1409. (TR 37-38). Mr. Pfeifer worked out of the Respondent's Neff Yard, in Kansas City, part of the Respondent's Kansas City Service Unit (KCSU). His regular route was from Kansas City to Marysville. (TR 40). UP has about 500 conductors in the KCSU. He testified that conductors supervise the operation of trains and handle all the administrative paperwork, such as logbooks. (TR 36).

During the period of July 3, 2010 through August 8, 2010, Mr. Pfeifer, while on-duty, reported rough track on Union Pacific's Safety Hotline.[10] As agreed, rough track is a hazardous safety condition. He testified he is concerned about safety. He is also concerned that if employees are too scared now to put things on the Safety Hotline, that it will not be a safer place to work. (TR 118). Mr. Pfeifer admitted Rule 1.1.3, of UP's General Code of Operating Rules, requires one to report, by the first means of communication, defects that may affect safe and efficient operations. (TR 142-3; EX K).[11]

A few weeks before his first Safety Hotline report regarding rough track, on June 10, 2010, Mr. Pfeifer met with the KCSU's highest manager, Mr. Corcorin. The Union and he complained that rough track reports to dispatch had not been attended too and that UP's test vehicle, a 5,000 pound high rail truck, would not experience the same defect as a 400,000 pound locomotive. (TR 139). Mr. Corcorin suggested making reports to UP's Safety Hotline, which would result in assignment of the report to a specific manager and written follow-up. He did not say anything about reporting it to the dispatcher. (TR 139-140). Mr. Pfeifer testified that he came away believing he could report any safety concern on the Hotline; it was not until he

[8] The added complaint involved the discipline for the October 20, 2010 failure to log end-of-track-authority. (EX AQ).
[9] Union official, Mr. Shawn Redhage's, testimony was partially disallowed because of his lack of knowledge of relevant facts. (TR 197, 223-234).
[10] CX 73 is a chart depicting the timeline of the events at issue.
[11] EX K is a report of Mr. Pfeifer's Hotline reports 7/3-8/8/2010.

subsequently met with Mr. French, a manager, that he understood he had to report rough track to the dispatcher, depending on the nature of the defect.

On July 3, 2010, Mr. Pfeifer reported rough track at different locations using the Safety Hotline; he did not report the issue to the dispatcher because he said he did not perceive a "defect;" there was no immediate danger, or possibility of an injury or accident but rather maintenance was needed. (TR 42-43, 142-3). Had there been a danger, he would have reported it to the dispatcher. (TR 44). It was his understanding that Hotline reports were assigned to a manager who would contact him within 24 hours. (TR 48). He admitted that at his deposition he had reported that his practice was to notify the dispatcher of rough track. He admitted, on cross-examination, that he was never disciplined for not reporting it to the dispatcher. UP Rule 6.21.1, which he had been tested on, requires reporting dangerous track defects or conditions which might cause an accident immediately to the dispatcher. (TR 42-43; CX 42). He did not believe Rule 6.21.1 clearly defines "defect." (TR 142).[12] CX 38 lists his Hotline reports, including for July 3, 2010. (TR 46).

On July 12, 2012, while on duty around mid-night, Mr. Pfeifer was asked to meet with Mr. Skeeter French, Manager of Operating Practices ("MOP"), at the Marysville Depot where the former was doing his paperwork. (TR 49- 63). Mr. French discussed two derailments, a personal injury, and his Hotline reports and showed him an email he had received from Mr. Albrecht, written by MOP Pratt, regarding mishaps and cleaning-up. (TR 51). Mr. Pfeifer testified that Mr. French mentioned the heat Superintendent Corcorin and DRO Pratt were taking from Omaha and that Mr. Pfeifer was bringing undue attention on the KCSU. (TR 53). Mr. French offered him a Level 2 coaching form for signature and threatened to pull him from service because he had not reported the rough track to the dispatcher, as required by UP Rule 6.21.1.[13] (TR 54, 144). Mr. Pfeifer explained it was merely a maintenance issue not "necessarily a defect." After consulting with fellow union officials, he declined to sign and testified that Mr. French told him he would pull him out of service and "see you in the field," which meant to him that he would be FTX tested.[14] (TR 54, 57, 62). He believed Mr. French became upset and began yelling. (TR 56, 145). They briefly adjourned and Mr. Pfeifer called Union officials. (TR 58). Upon reconvening, Mr. Pfeifer said he would comply with the rule. (TR 61). He returned to duty. Prior to this meeting, Mr. Pfeifer testified he would not have reported rough track not needing "immediate attention" to a dispatcher, but only on the Hotline, unless it was "extremely rough." (TR 136-138). Mr. Pfeifer explained his understanding of UP's progressive discipline policy and what the impact would have been had he accepted the coaching. (TR 55; see EX P).

[12] Rule 6.21.1 states: "If any **defect or condition** that **might cause an accident** is discovered on tracks, bridges, or culverts, **or if** any crew member **believes** that the train or engine has passed over a **dangerous defect**, the crew member must immediately notify the train dispatcher and provide protection if necessary." (Emphasis added).
[13] CX 78 is a blank representative Level 1-2 coaching form. The form states that excessive violations of level one or two rules "will result in disciplinary charges" of violating Rule 1.13, failure to comply with instructions. (TR 56).
[14] Mr. Pfeifer testified that FTX testing failures can result in discipline. (TR 62).

The next time, after returning from the Marysville meeting with Mr. French, he experienced rough track, on July 13, 2010, Mr. Pfeifer reported it to the dispatcher then on the Hotline. (TR 63, 146, 346; CX 38). He reported it on the Hotline to ensure a safe environment and that the issue would be addressed. (TR 64). He also wrote to Mr. Corcorin about his meeting with Mr. French because he felt his job was in jeopardy. (TR 65). He reported rough track to the dispatcher, on July 28, 2010, and the Hotline. (TR 66, 347).

On August 4, 2010, Mr. Pfeifer was the subject of an FTX structured stop test by managers Mendoza and French. (TR 68-70). This was his first FTX test after he had made a Hotline report. (TR 148). He passed, but they purportedly threatened him with a write-up for a violation of Rule 1.47C, which he disputed, and "conferenced" him.[15] (CX 56; TR 70, 148-9).

Mr. Pfeifer made his next rough track report to the dispatcher, on August 8, 2010, followed by a Hotline report; observing there was no threat of immediate injury. (CX 38; TR 71-72, 347). Mr. French emailed stating there was no need to make such reports to the Hotline when the dispatcher and maintenance have been informed and protection issued. (TR 74-75). At a Zone 2 training session, Mr. Mendoza had generally discouraged Hotline use, but not explicitly. (TR 155).

Then, on August 10, 2010 and August 12, 2010, Mr. Pfeifer was subjected to FTX testing by Mr. French. (CX 56; TR 73, 75-76, 149). He passed the August 10 test. (TR 149). The second day involved two tests, which he felt was unusual. He passed the first, a train whistle test, but was written up for the second whistle test and a structured stop test where he had not written "stop" in his log. He was not disciplined, but was "coached." (TR 73, 76, 77-78, 157). So, in August 2010, he had five FTX tests, failing four; he had never before been tested five times in one month. (TR 83).

Mr. Pfeifer sent a letter, dated August 15, 2010, to Mr. Corcorin addressing FTX testing, harassment of reporters, and UP's "Gestapo" tactics. (TR 149-153; CX C; EX C). On August 17, 2010, Managers Johnson, Mendoza, Albrecht, and Blackman, subjected him to FTX testing involving an unannounced "yellow board" scenario. (TR 79, 158). Such tests have high failure rates, but he passed although they took exception with him writing "YB" rather than "RSR" in his logbook. (TR 79, 81). Mr. Pfeifer testified he was never aware of any employee being FTX tested five times in one month and that coupled with the write-ups was unusual. Moreover, he testified that the logbook scrutiny increased after his Hotline use. (TR 82-83). On August 31, 2010, Manager Albrecht purportedly told Mr. Pfeifer to stop making his Hotline reports, purportedly saying he would delete them if it continued. (TR 84-85). Mr. Pfeifer told him he

[15] Mr. Pfeifer testified that "conferencing" occurs when an employee passes all the tests except one management takes exception to. (TR 71).

would continue to use the Hotline. (TR 85). Mr. Pfeifer sent another letter, dated August 25, 2010, to Mr. Corcorin wherein he called management "Gestapo." (EX G; TR 154).

Mr. Pfeifer filed his initial FRSA complaint with OSHA, on September 9, 2010. (CX 11; TR 85). He was FTX tested thrice in September, failing one, a passing train inspection test, conducted by Mr. French, on September 11, 2010, because he had not radioed "highball" to the passing train to indicate there were no defects. (CX 11; TR 86-87). He was not "disciplined," but only "conferenced." (TR 158). He testified most conductors will not radio the passing train unless there is a defect observed. (TR 88-89).

Mr. Pfeifer passed a FTX test with one exception, conducted by Mr. Mendoza, Mr. French, and Mr. Johnson, on October 20, 2010, dealing with the "end of track warrant authority" because he had not noted the end of authority in his log book. (TR 89-100, 161-170). He took issue with the write-up, initially "conferenced," for not making an entry in his logbook, as the train had not reached mile-post 76, the end of authority, but only mile post 74. (TR 160; EX BC). UP Rule 1.47, with which he was familiar, deals with the issue, but is somewhat unclear. (CX 9; TR 97). Mr. Pfeifer had never represented an employee accused of such a thing and felt singled-out. (TR 100-101).

Mr. Pfeifer summarized testifying; that in the period of July through October 2010, he was the subject of ten FTX tests with six failures whereas in the four months before his Hotline reports he had only been tested four times, failing not once. (TR 101, 102). On cross-examination, he admitted he was tested three times in January 2010, four times in February, never in March, twice in April, once in May, once in June, not in July, but could not recall if he had made Hotline complaints during that time and failed only one test in February. (TR 146-149, 171; EX BL).[16] He believes that FTX failures could lead to losing points in his employee development review which might be tied into discipline. (TR 171-2).

On October 27, 2010, he met with manager Johnson regarding the 10/20/2010 end-of-authority test failure and was charged with a Level-3 discipline.[17] (TR 102, 160; CX 6, dated 10/27/2010). He contested the discipline through the CBA process, but after a November 3 hearing, was given a five-day suspension without pay (a $2,170 loss) and a Level-3 with an eighteen-month retention period. (TR 106, 109, 169). The record of the matter was to remain in his record for eighteen months.[18] As of the date of the hearing, his appeal remained under consideration. (TR 169). As UP has a progressive discipline policy (CX 76), he remained at

[16] EX BL is Mr. Pfeifer's individual FTX testing report from Jan. 16-August 17, 2010.
[17] UP has a "progressive disciplinary policy encompassing five levels, 1-5. After discipline at one level an employee will be disciplined at the next level for the next violation even if it would otherwise be a lower level infraction.
[18] This was subsequently overturned by the Public Law Board.

Level-3 thus he believed any additional discipline could be at Level-5, i.e., termination. (TR 107-8).

Mr. Pfeifer testified that he has attempted to make himself less available for FTX testing by changing his status to a rotating trainmen's "extra-board" employee, thus reducing his work days from 24 to 15 a month, losing about $4,277 in six months. (TR 109-111; CX 45). However, he admitted, on cross-examination, that he retains his seniority and even today could bid on his old job. (TR 170). He feels the matter has affected his marriage, created financial difficulties, and made him irritable. (TR 112-114).

Mr. Pfeifer testified he examined UP testing data for 7/1/2010-12/31/2010 for trainmen including nearly 500 conductors. (TR 118-121; CX 52). CX 59 is a spreadsheet prepared by his counsel, covering July – October 2010, which was used to prepare CX 64, a pie chart, covering only July through October. (TR 132). The pie chart reflects that: 285 conductors or 65% were never coached; 116 or 27% only received one coaching; 32 or 7% were coached twice; five conductors were coached three times; and, less than 1% (Mr. Pfeifer) were coached six times. (TR 122-123).

Mr. Skeeter "Josh" French used to be the KCSU Manager of Operating Practices and is himself a union member. (TR 236, 268). As such, he was responsible for safety, efficiency and freight movement. (TR 237). He had previously served as a brakeman and conductor himself. He supervised some 1200 employees. (TR 237). His employees are out on the railways and largely not directly supervised; thus, it is easy for some to become lax with their routines. (TR 271). Thus, FTX testing is done to try to recreate real life situations they might run into to check their performance. (TR 271). He acknowledged he has a reputation for testing more than any UP manager. (TR 272). He described some of the FTX tests conducted and observed some are federally required, i.e., 180-day tests for engineers. (TR 273). He added, "We try to give an employee, each employee one test period, 120 days minimum and an engineer one stop test, structured stop test every 180 days." (TR 306).

Mr. French testified that Mr. Pfeifer was a "good" employee who tried to do a good job and was safety conscious. (TR 238, 334). He admitted rough track is a safety hazard. (TR 242). He has received anti-retaliation training. (TR 267).

Mr. French testified that CX 39 is a January 2011 email by Mr. Pratt, his boss, addressing use of the Safety Hotline as an option in reporting unsafe conditions. (CX 39; TR 243).[19] Rule 6.21.1 requires it, rough track, be immediately reported to a dispatcher. (TR 278). The reporter is not to assess the severity of rough track, but leave it to those responsible. (TR 279). It may later

[19] CX 39 provides that the "preferred and safest method of correcting unsafe conditions is through the immediate notification of a manager."

be reported to the Hotline. (TR 280). Upon receiving such a report the dispatcher puts a 10-mph/slow limit on the track then engineering examines it. (TR 279). On 7/3/2010, managers could see who filed Hotline complaints. He was aware of the 7/3/10 Hotline report and discussed Mr. Pfeifer's Hotline complaints with managers Pratt and Albrecht. (TR 242, 247). Failure to report rough track is "pretty scary" since UP hauls a lot of hazardous materials and it could have serious implications, such as injury, harm, or derailment. (TR 278, 297).

On the night of July 12-13, 2010, Mr. French met with Mr. Pfeifer at Marysville to discuss Rule 6.21.1. (TR 248, 282; CX 42). The rule requires rough track be reported to dispatch without the reporter exercising judgment as to its degree; a trained track maintenance inspector must examine it. (TR 278-9). CX 38 is Mr. Pfeifer's multiple rough track 7/3/2010 Hotline report. (TR 277). When a UP manager learns an employee violated a safety rule, he must either coach or discipline him. (TR 260). Mr. French wanted Mr. Pfeifer to sign the coaching form because he had reported several sections of rough track on the hotline, but not turned any of them in when he traversed the track. (TR 254). He discussed UP's derailments and personal injury and the fact Mr. Pratt was upset, i.e., his career hanging by a thread. (TR 249-250, 295). He showed Mr. Pfeifer an email about the events. (CX 49; TR 250, 295). Mr. French was concerned that someone might consider Mr. Pfeifer's dereliction as "gross negligence." (TR 265). He proposed giving Mr. Pfeifer a Level 2 coaching form, related to his failure to call the dispatcher versus his Hotline report, in lieu of discipline. (TR 252-254, 293). In response to his inquiry, Mr. Pfeifer explained he had not reported the rough track to the dispatcher as a result of his meeting with Mr. Corcorin and belief that nothing is done about it (when merely reported to dispatch). (TR 290). The conversation became "heated" and both became upset and raised their voices; others were telephoned. (TR 256, 291). Mr. Pfeifer became angry and kicked a chair; he was probably insubordinate. (TR 292). Mr. Pfeifer denied being agitated, angry, or kicking a chair. (TR 145). He testified it was unlikely he said he would pull him from service, he did not tell Mr. Pfeifer that he would see him in the field and did not tell him he would adjust his schedule. (TR 257, 259). Mr. Pfeifer declined the coaching but assured future compliance. (TR 259, 296). There never was any discipline for his 7/3/2010 report. (TR 259, 294). He spoke with Mr. Bagby and Thibadeau about it and showed them the email from Mr. Pratt. (TR 262-3).

On August 10, 2010, Mr. French sent Mr. Pfeifer an email thanking him for compliance with the reporting standard. (CX 16; TR 298-300). In response, Mr. Pfeifer sent him an angry email accusing UP managers of lying and him of being sly and intimidating. (TR 301-302; CX 16). On July 19, 2010, he asked Mr. Pfeifer to publish reporting rule 6.21.1 in the Union newsletter; the latter declined to do so. (EX AD; TR 302-304).

On August 12, 2010, Mr. French administered several FTX tests on Mr. Pfeifer and others. (TR 323; CX 56). He "conferenced" him because he had failed to record a stop entry in his log book for the red signal stop test. (TR 325). Mr. Pfeifer failed a whistle test and was

conferenced on it. (TR 329). Mr. French explained EQMS scores and the EDR. (TR 326, 344). Before December 2010, one could lose EQMS points for failing an FTX test. (TR 326). One does not lose EDR points because FTX testing is not tied to it. (TR 343-4). Although CX 56 shows Mr. Pfeifer was tested on six rules, on August 12, 2010, it constituted but one FTX test. (TR 328).

Mr. French testified that he tested more than any other UP manager. Sometimes specific areas of track would be tested. (TR 273). UP tried to test every 120 days. Mr. Pratt and the FTX guidelines determine the actual requirement. (TR 274). If UP incurs a personal injury testing is increased. Since incidents increase, UP tested more during the "summer spike," May-August, and "holiday havoc," around Thanksgiving, Christmas, and New Year. (TR 309). He denies targeting Mr. Pfeifer for testing in retaliation for his Hotline reports; in fact, Mr. Pfeifer was tested less than a lot in August and September 2010 and he believes several employees had been tested more. (CX 56; TR 306-307, 345, 349). In June he was tested once and five times in August; the more one works the more one may be tested. (TR 337). Being tested twice in one day is not an everyday occurrence, but is not unusual. (TR 332). His testing would have increased during "summer spike" and "proactively" when personal injuries occur. (TR 309, 321-2). CX 56 shows Mr. Pfeifer's FTX testing, between September 6, 2008 and September 2, 2010. He was FTX tested on 9/8, 9/11, and 9/26. (CX 11; TR 338-339). EX BG is an EQMS report of FTX testing 600-800 KCSU employees between July 1 and December 31, 2010.[20] (TR 311, 321). From examining EX BH, Mr. French determined that FTX testing had increased for certain trainmen. (TR 313). For example, Mr. Armstrong was tested eleven times between October and November 2010; Ms. Allison was tested ten times between October and November 2010; Mr. Bolin was tested five times between August and September 2010; Mr. Quinn was tested thirteen times between November and December 2010; Mr. Stang was tested thirteen times between September and October 2010; Mr. Boos was tested six times between August and September; Mr. McElyea was tested eleven times between November and December 2010. (TR 317-319).

Mr. Joseph Guatney, Manager of Track Maintenance-Topeka, Kansas, testified how rough track complaints are handled once the Maintenance-of-Way Department is notified of the condition and how Mr. Pfeifer's complaints were handled. (TR 644). He has three FRA-certified track inspectors working in his 30-man department. (TR 645, 657). He and his inspectors inspect all of the Kansas City Service Unit's tracks every day. (TR 651, 657). When rough track is reported to the dispatcher a 10 mph speed limit is established for the area to protect the track and make it safer to traverse and he is notified. (TR 646). An inspector is sent to inspect the alleged defect; sometimes a defect is found, other times not. (TR 647). While a locomotive crew may experience rough track differently than one in a high-rail truck, his inspectors have the

[20] The compilation (EX BH) he prepared regarding FTX testing, based on EX BG, was withdrawn. However, EX BG is identical to CX 52 which was admitted. When EX BH was withdrawn the Respondent averred a stipulation would be substituted. (TR 341-2). Mr. French testified that without EX BH he could not name employees tested more than Mr. Pfeifer. (TR 343).

experience to know what to look for. (TR 649). The inspection may result in the track being placed "out-of-service," a 10 mph speed limit being maintained, or if nothing is found, it is placed back in full service. (TR 649). Mr. Guatney believes reporting rough track to the Safety Hotline was not a fast enough remedy, because they have many heavy trains using the track; a report to the dispatcher results in more immediate action. Sometimes he does not see Hotline reports until after the track was inspected. (TR 650). He testified that it is much better to get a report and inspect immediately. In his view there is no "over-reporting" of track defects. (TR 659). He confirmed the Complainant made Hotline complaints on 7/3/2010, 7/28/2010, and 8/8/2010. (EX BK; TR 652-656). Between 7/3 and 7/13/2010, he knew of no findings of defective track and no reports of injury or derailments in the KCSU. (TR 659). He believes some of Mr. Pfeifer's rough track reports were legitimate; it's better to report it and inspect it immediately. (TR 660). UP runs a lot of heavy coal trains, i.e., sometimes 40 per day, in his area, and those trains might run across such an area before his inspectors got back to look at it. (TR 660).

Mr. Kevin Pratt is UP's KCSU Director of Road Operations. (TR 663, 667). He became a manager in 2000 and remains a qualified railroad engineer. (TR 665). He is responsible for federal compliance. His position requires him to develop testing plans and carry out testing of employees. (TR 667). Mr. Pratt testified that UP's training for non-retaliation for complaints involving safety and medical concerns mimics the requirements of the FRSA. (TR 720). In developing the FTX testing plan, he reviewed three past years of "human factor" incidents, i.e., where employee behavior had resulted in problems. (TR 684). He then coordinated that history with GCOR rules to determine and issue a requirement for a minimum number of tests to be administered. (TR 684). He assigned weekly testing requirements to the 48 various testing managers. (TR 686). He posts what will be tested and any incidents that had occurred on a quarterly basis. (TR 686). He testified that the increased testing is UP's "best avenue" to avoid human factor incidents.[21] (TR 688). For the first six months of the year, trainmen are busy with rules testing. (TR 689). Mr. Pratt testified there were periods when FTX testing was increased known as "holiday havoc" and "summer spike" meant to address seasonal trouble periods. (TR 689-692). UP is "proactive" around the clock, if safety issues do not decrease, he continues the testing. (TR 690). Some managers test more than others, but it is never considered retaliatory and management misuse of testing would result in their discipline. (TR 693-4). Managers must meet their testing quotas. (TR 686-7). The KCSU had a dismal record of federal decertifications in October, so UP tests more then as well. (TR 692-3). UP does not "selectively" test employees. (TR 741).

After an employee, Mr. Bonawitz, complained of Mr. Pfeifer being retaliated against with testing after making Hotline reports, in 2010, Mr. Pratt examined the FTX testing records for

[21] If the testing reveals a rules infraction, the testing manager "coaches" the offender. If an employee is repeatedly written-up for Rules violations, he is subject to discipline for failure to comply with instructions.

2010 and observed that Mr. Pfeifer had not been among the top one-third of the employees in the KCSU tested; nor was he the most-coached. (TR 719, 733-5, 744; EX BF).

Mr. Pratt testified that UP encourages Hotline use to engage their employees who know their jobs and see things managers do not. (TR 697, 736). He admitted he had asked folks not to put certain things on the Safety Hotline, i.e., lights out on the track bed. (TR 696). He had asked employee Newman, who had recorded 150 Hotline complaints, what his issue was. (TR 739-740).

Mr. Pratt testified that he had queried UP's computer records, EQMS, regarding testing on Rule 1.47A, for which only conductors are tested, for the period of 5/20/2007 through 11/6/2011, in the KCSU. (TR 702-3).[22] 2,129 such tests were conducted with 1,838 conductors passing and only 289 coached. (EX AY; TR 711, 717). 1,949 other structured tests were conducted with 65.6 percent associated with a "stop" test; more than 10 percent had trouble passing. (TR 718). One cannot ascertain from EX AY which part of Rule 1.47A was violated. (TR 730).

Mr. Pratt sent the 7/12/2010 email to Mr. Albrecht as a "motivational tool," because UP had had some incidents. (EX AO; TR 698-700). "Sometimes it's good for a local relationship for the managers to be able to say, you know, the DRO is upset, we need to get this under control. . ." (TR 700-701). He pointed out that within two weeks "engagement" and safety improved. (TR 701).

When he learned of Mr. Pfeifer's 7/3/2010 Safety Hotline hazardous track report, his immediate concern was getting a protective order on that area of track; he found none; nor had dispatch been notified. (TR 670). With respect to the 7/12/2012 incident, Mr. French did call him to report the coaching was not going the way he wished; he did not want to discipline Mr. Pfeifer. (TR 671, 723-4). Mr. Pratt told him not to escalate the matter and that the latter could go the CBA route. (TR 672). Later, Mr. Law, the BLET Vice Chair met with Mr. Corcorin and him asking to drop the complaint, which Mr. Corcorin did. (TR 674). Mr. Pratt referred to two incidents involving Mr. Pfeifer in which leniency was exercised.[23] (TR 674-683).

Mr. Pratt denied the allegation he had made comments, in a class, about whistleblower cases taking money away from projects and have an impact on labor relations discussions, nor did he target Mr. Midgely with a retaliatory unannounced yellow board test for having previously complained about them, since he was not aware of any such prior test. (TR 737-8).

[22] The Respondent agreed the listing could inexplicably contain the names and results for up to two dozen engineers. (TR 715).

[23] Testimony concerning the two instances of leniency was considered for the limited purpose of showing leniency had been previously exercised. (TR 682).

Mr. Shawn Redhage, a union official and UP employee, testified about an informal conversation he had had with Mr. Pratt the day after Mr. French's attempt to serve Mr. Pfeifer with the Level formal coaching, in Marysville. (TR 218). He testified that Mr. Pratt said, "talk to Nick to see if I could get him to sign, you know, talk some sense into him and have him sign for a level three because otherwise they were going to have to charge him with a level five, permanent dismissal." (TR 218). "That's called dealing on an investigation hearing. Every local chairman does it." (TR 224). Moreover, when asked about employees' concerns about making Safety Hotline reports, he testified, "For the last 12 years, yes, if you go back and look on the safety hotlines, you will probably see my name or John Janczek's name, or anyone of our union officers, because there was a fear for retaliation for putting stuff on the safety hotline. So, people, therefore, would use our names because we were union officers and thought we were protected a little bit more to be able to put stuff on safety hotlines." (TR 220).

Mr. Denis Corcorin is the General Superintendent Transportation Services of the Respondent's Kansas City Service Unit ("KCSU"). (TR 475). With twenty-seven years in the railroad industry, he had seven years with the Respondent and has been the Superintendent for over three years. He has about 1600 employees under him. (TR 476). Mr. Corcorin testified that Union Pacific has a "total safety culture" with the Safety Hotline being an important element. (TR 477). The FRA is not required to review Hotline reports, but UP has shown them the reports before. (TR 501). Nor does Omaha review Hotline reports. (TR 501-2). Testing its personnel helps set the standard. (TR 478). The FTX testing manual states that testing may not be used to entrap employees.

Mr. Corcorin was personally familiar with Mr. Pfeifer having ridden with him, but was skeptical of some of his claims, i.e., about college credits. (TR 480-1). He recalled the June 10 meeting with Mr. Pfeifer, where the latter was concerned UP was not doing anything about employees' rough track reports. (TR 481). While he did not say not to notify dispatch of rough track, he said it could be reported on the Hotline for formal documentation. (TR 482-3). Rule 6.21 requires crew members to report rough track to a dispatcher. (TR 484; EX A). He sees Hotline complaints; typically 5-10 a day and assesses whether a systemic problem exists. (TR 486-8). Mr. Corcorin was aware of the 7/3/2010 incident, but declined to take disciplinary action because of a request for leniency from the Union. (TR 486). He received Mr. Pfeifer's August 15 letter and believed most of it was unprofessional, i.e., with Gestapo references, and unsupported. (EX C; TR 489-491). He responded, on August 18, 2010, and asked Mr. Pfeifer to set up a meeting; which the latter never did. (TR 492, 496; EX F). Mr. Pfeifer responded with what Mr. Corcorin believed was another unprofessional letter, again calling management "Gestapo." (TR 495; EX G). Mr. Corcorin did not investigate the allegations because it was hearsay, had no data and no meeting occurred. (TR 515, 518). He learned of his whistleblower complaint in September 2010; it was handled by the legal department. (TR 497, 533). At the hearing, Mr. Corcorin was only aware of Mr. Pfeifer's allegation that he had been retaliated against for the July 3rd report. (TR 517). With respect to Mr. Pfeifer's discipline for the FTX failure involving

the end-of-track-authority, he transferred it to Mr. Whitthaus, superintendent of an adjoining service unit, for resolution to avoid any appearance of unfairness. (TR 500).

Correcting his earlier deposition testimony, Mr. Corcorin testified that UP has had whistleblower training, he is aware of the FRSA, and every year UP managers must sign an anti-retaliation statement. (TR 498, 510). He was emphatic that UP never retaliated for safety complaints; if one of his managers did so the latter would likely be terminated. (TR 499-500, 506). While UP had had two derailments neither was the fault of the KCSU and there was no "heat" (or pressure) from superiors in July 2010. (TR 503, 505). Mr. Albrecht does not work for Mr. Pratt, thus Pratt could not fire him. (TR 505). Mr. Corcorin denied ever telling Mr. Pratt that his career was hanging by a thread because of those derailments. (TR 505). Mr. Corcorin was not aware of any complaints about Mr. French abusing the FTX testing. (TR 525).

Mr. Charles Nowlin, who works for UP and is the elected General Chairman of the United Transportation Union, testified that he was involved in Mr. Pfeifer's "rough track" case. (TR 438). Mr. Pfeifer first called him, seeking advice, on the evening of July 12-13, 2010, when he had been offered a Level-2 coaching form by Mr. French. (TR 438-9). He advised him not to accept it because it would be a mar on his record and excessive Level-2 violations could lead to discipline for violation of UP Rule 1.13. (CX 74; EX P; TR 439). Mr. Nowlin considered a level two coaching form a form of discipline or rather a black mark on one's record. (TR 440). Excessive violations of Level 1 or Level 2 rules may result in a violation of Rule 1.13. (TR 443; CX 74, page 4). Mr. Pfeifer subsequently sent him a letter concerning his interaction with Mr. French. (TR 444). He is familiar with the Collective Bargaining Agreement ("CBA") between UP and the United Transportation Union. (TR 436; CX 8).

Mr. Nowlin testified that they are told FTX testing is not supposed to be used for retaliation. (TR 446). Such testing enhances safety. (TR 460). FTX test results have been used in some disciplinary proceedings in which he appeared. (TR 447-8). In his opinion, more than one FTX test per day (per employee) is unusual. (TR 446). It is also unusual for four or five managers to participate in one FTX test. (TR 446). Having handled some 560 UP disciplinary cases, he is familiar with UP's progressive discipline policy. (CX 76; CX 77; TR 448-453, 457).[24] He could not recall any incidents of discipline for a single log book (1.47) violation, but knew of one end-of-authority log book infraction. (TR 455). CX 41 is a letter he wrote to UP's Mr. Kendall with concerns regarding the potential impact of Mr. Pfeifer's whistleblower case and the alleged harassment he received. (TR 456). He described the distinction between formal and informal coaching and believed that had Mr. Pfeifer signed the coaching form it would have gone in his record. (TR 465-468).

[24] CX 77 is a worksheet used to calculate discipline. (TR 454).

Mr. Frederick Dennin, II, a retired FRA inspector, former FRA administrator, and railroad safety consultant with decades of relevant railroad experience testified. (TR 544; EX BE). He had served as a FRA track safety specialist and track inspector and maintains his certification to do so. (TR 547-8). The industry has a General Code of Operating Rules ("GCOR") such as those used by UP. 49 C.F.R. § 217.9 requires efficiency testing to ensure employees comply with the hope of reducing accidents. (TR 551-3, 567, 582; EX AU). There is no question testing reduces human factor accidents. (TR 554). Railroads typically ask their officers to conduct about twenty tests a month or more if they had suffered problems. (TR 598-9). He testified that the industry standard for reporting hazardous track requires a report by radio, i.e., the most expeditious means of passing the information on to the dispatcher for follow-up action and inspection. (TR 560, 568). While a Hotline report may be made, it "behooves the individual to immediately report that by the first available means to the train dispatcher…" (TR 561). The FRA typically does not monitor Hotline reports. (TR 568, 570). While federal regulations allow some track deviation, only trained track repair experts are qualified to measure and assess tracks. (TR 561-3). While 49 C.F.R. § 213.37 discusses rail defects, there is no CFR definition of "rough track" which must be reported and it is a somewhat of a subjective determination, but if there is ever a question, it must be reported.[25] (TR 579-582, 597). UP's rule, 6.21.1, does not define "dangerous" defect. (CX 42; TR 578).

Mr. Dennin testified about the "end of authority" rules. He believes it involves a judgment call. (TR 587). In his opinion, UP's Rule 1.47, required the conductor, in this case, to tell the engineer about the end of authority two miles before Mile Post 76 and likewise log it then. (EX J; CX 9; TR 575, 588-592). The log entry is just another means of ensuring the communication occurs. (TR 593). He had never heard of a conductors' log used by any other railroad, as here, except "delay" reports. (TR 576-7).

Mr. Michael Johnson, UP's Manager of Operating Practices, testified about the end-of-authority FTX testing and charging Mr. Pfeifer with violating the UP rule. (TR 602). The purpose of FTX testing is to ensure compliance with UP's rules, evaluate employee skills, and serve as an educational opportunity. (TR 604). There is a required testing frequency per position, i.e., about twenty per month; so if a manager waits until the last week of the month, he must do the tests then. (TR 605). UP tests for: speed, authority, slow orders, limits of authority, documentation, and identification. (TR 606). The types of testing depend on whether UP has had incidents, e.g., a derailment. (TR 607). The KCSU requires FTX testing on every five-mile increment of the entire territory. (TR 608). Managers decide on where and how to test, sometimes testing is concentrated where the most train traffic is. (TR 609). For example, Marysville has 50-60 trains per day. (TR 609). Some trains must be let by without testing to avoid stacking them up and specific employees are never targeted. (TR 610-611). In setting up tests, Mr. Johnson testified that he does not know which trains will come through; all he does is

[25] According to Mr. Dennin, "rail" is a component of "track." (TR 581). Section 213.113 discusses defective rails.

pick a location to do the testing. (TR 630). Mr. Johnson specifically denied targeting Mr. Pfeifer or retaliating against him for Hotline reports and knows of no one else who might have. (TR 611).

Mr. Johnson testified that on October 20, 2010, he, Mr. French, and Mr. Mendoza, conducted testing in one location involving several trains. (TR 612-615). They set up an end-of-track-authority test for the next train, which unknown to them happened to be Mr. Pfeifer's. (TR 616). The train stopped at mile post 75. (EX BC). They boarded and determined Mr. Pfeifer had not documented the end-of-authority in his conductor's log book. (TR 618). The crew passed the end-of-authority portion of the test. (TR 632). Mr. Johnson regularly checks log books. (TR 624). Mr. Pfeifer was coached about it and responded he "didn't give a shit."[26] (TR 618). Mr. Pfeifer explained he had not logged the event as they had not yet reached the end of their authority. (TR 638). He was written up and subsequently charged by Mr. Johnson for violating Rule 1.47A; which required a log entry at or about mile post 74, i.e., at least two miles before the end-of-authority. (EX J; TR 621-623, 625). Mr. Johnson testified that the two miles before the end of track authority is the "cab red zone," in which the crews' focus must be solely on the "critical" task of stopping the train within the restriction. (TR 624, 640).

Mr. Daniel Whitthaus, the UP Superintendent of the adjoining St. Louis Service Unit, testified that Mr. Corcorin had asked him to handle Mr. Pfeifer's disciplinary case, related to the October 20, 2010 infraction, and he did. (CX 5; TR 781). He found Mr. Pfeifer had violated Rule 1.47A by failing to log the end-of-track-authority. (EX J; TR 783). He imposed the maximum five-day suspension largely because it was reported Mr. Pfeifer had said he didn't care. (TR 785). He had not been aware of Mr. Pfeifer's Hotline complaints or harassment allegations. (TR 791).

Mr. Michael Phillips, UP's General Director of Labor Relations, testified about the Collective Bargaining Agreement and Mr. Pfeifer's specific case under it. (TR 745). The UTU CBA specifies a disciplinary process which requires an investigation. (TR 751). UP establishes its own disciplinary policy and has established progressive levels of discipline. (TR 752-3, 771; EX P). UP's Policy provides for a particular level of discipline for a rules violation; if another violation occurs within a set time period, the subsequent discipline would build on the first level as there was not a change in behavior.[27] (TR 753). Discipline may not be imposed without following CBA procedures, which includes an investigation, hearing, grievance and arbitration. (TR 756-7). Neither formal nor informal "coaching" is considered disciplinary, but if a form is used for coaching it constitutes formal coaching and goes into the employee's record. (TR 761-3). He admitted repeated violations of the same rule could possibly increase the level of

[26] At the CBA hearing, he testified Mr. Pfeifer had said he did not care. (TR 634; CX 5 page 27).
[27] Mr. Phillips explained the use of the progressive disciplinary table at page 14, EX P. (TR 754-755, 771-773). The table provides that if one commits three repetitions of the same level 3, 4, or 4C infraction, i.e., a violation of Rule 1.47A, within 36 months, discipline will be assessed at Level 5, termination. (TR 773-4).

discipline, but that is infrequent. (TR 763, 776). In Mr. Pfeifer's case, the matter, i.e., the October 20 violation, was to go before the Public Law Board on April 18, 2012 for arbitration.[28] (EX BI; EX BJ; TR 764-766). The Public Law Board issued its findings, in favor of Mr. Pfeifer, on June 5, 2012; the discipline was removed from his record and he was compensated a wage-equivalent for the period of his suspension. (Complainant's Brief at 13, 40).[29]

Mr. Scott Thibadeau, a UP engineer and BLET Union official testified that Mr. Mendoza had suggested not using the Safety Hotline initially for safety reports, but rather call a manager, who could resolve the matter, because the FRA monitors the Hotline complaints. (TR 208-222). Nor had Mr. French ever told him not to use the Hotline. (TR 218). It is Mr. Thibadeau's practice to call in rough track to the dispatcher. (TR 218). He was with Mr. Bagby the night of July 12 and witnessed the conversation with Mr. French. (TR 214). He did not believe Mr. French was agitated, but rather was wound up. (TR 215-6).

Jamie Midgely, an employee and union official, testified that he had felt targeted for an FTX yellow board test, conducted by multiple managers, after a heated disagreement with manager Blackman. (TR 392-3, 396). He passed the first one. (TR 393). He was unaware of anyone being coached for a logbook violation, other than Mr. Pfeifer, or any discipline for log book violations. (TR 397).

Robert Cohorst, a retired UP engineer and former union official, testified that he had never heard of an employee being offered a "level" coaching for making Hotline reports. (TR 174-182). Nor did he know of anyone getting a Level-2 for failing to report rough track to a dispatcher. (TR 181). He believes quite a few employees will not use the Hotline because of fear of retaliation. When it comes to rough track, one must use common sense, that is, there must be something wrong so as not to slow trains before dispatch is called. (TR 181).

Kyle Bagby, a UP engineer and BLET union official, testified that he was called to Marysville July 12, 2010 after the French-Pfeifer meeting. Mr. Pfeifer had left. (TR 182-200). Mr. French showed him an email from Mr. Pratt about personal injuries and derailments. (TR 189-191). They discussed Mr. Pfeifer's Hotline versus dispatcher reports and discipline; French appeared agitated with him. (TR 192-3). It had been suggested by Mr. Mendoza, at a safety meeting, that the Hotline not be used because UP's headquarters (in Omaha) and the FRA see them. (TR 194). It is his practice to report rough track to the dispatcher. (TR 200). Mr. Bagby was not aware of anyone having been disciplined for a logbook violation. (TR 196). After July

[28] EX BJ references two other Rule 1.47 violations by Mr. Pfeifer, August 8, 2010, August 20, 2010, and October 20, 2010. This referred to a stop test and a yellow-board test previously discussed. (TR 794). The parties were asked to address the impact, if any, of the results of the Public Law Board. (TR 797-798).

[29] In its June 27, 2012 post-hearing Brief, Complainant leaves it to my discretion whether or not to give the Public Law Board's findings consideration. While I note said result, I do not give it any deference.

2010, it was his opinion that other UP employees did not want to work with Mr. Pfeifer for fear of increased testing. (TR 197).

Conductor Kevin Callahan testified that after using the Safety Hotline twice, in August 2010, he was subjected to three FTX tests later in the month by managers Mendoza, French and Albrecht; he felt it was in retaliation. (TR 424-429, 433; CX 47).[30] From January 1, 2010 up to August 2010, he had been FTX tested three times; but then three times in three weeks subsequent to his Hotline reports. (TR 429). Mr. Callahan had never heard any UP manager say not to use the Hotline. (TR 432).

Conductor and union official Anthony Johnston testified that he had attended a UP safety class, in September 2011, where managers Mendoza, French and Albrecht had asked them not to use the Hotline if they did not mind, but rather to first make a report to a manager so the matter could be corrected. (TR 416-7, 420). He also felt Mr. Pratt had generally discouraged whistleblower complaints. (TR 415-6, 418). Mr. Johnston had never heard of anyone getting written-up for logbook entries. (TR 418).

Conductor Chris Gorden testified that Mr. Albrecht and Blackman had asked him not to use the Hotline, but rather make an "in-house" report, but that Mr. French had told him to use it. (TR 405). He had used the Hotline himself in 2010-2011 without any retaliation. (TR 407).

Conductor and union official Mr. Dan Bonawitz testified that he is responsible for keeping safety records and monitors the Hotline daily. (TR 356-7). He goes into the field to ensure the matter reported to the Hotline is fixed. There had been some concern that some Hotline matters had been closed or deleted without having been corrected. (TR 358-9). At one point, management had encouraged Hotline use; not now. (TR 366, 379). One of his biggest concerns is that employees are not harassed for using the Hotline, however, he cannot say if such employees get more FTX testing, but Mr. Pfeifer's seemed atypical compared to his own testing. (TR 360, 385). There were months when Mr. Bonawitz was not FTX tested and months when he was tested three times. (TR 386). He had attended a meeting in which Mr. Pratt had discouraged Hotline use because we did not need the FRA or Omaha knowing our business regarding an employee he believed had made an unreasonable number of Hotline reports. (TR 361-2, 381). UP no longer allows anonymous Hotline reports, thus he believes employees are now less likely to use it. (TR 364, 367). He too heard Mr. Mendoza discourage Hotline use at a safety meeting. (TR 368). In his discussions with Mr. French, Albrecht, and Mr. Johnson, he felt they strongly suggested not using the Hotline for safety complaints because of scrutiny by Omaha or the FRA. (TR 370). Mr. Bonawitz felt Mr. Pfeifer's write-ups, i.e., for end-of-track-authority, were atypical and that the latter had been targeted. (TR 371-372).

[30] Only the first three pages of CX 47 were offered and admitted; the remaining pages deal with another employee.

THE LAW

The FRSA prohibits railroad carriers engaged in interstate commerce from discharging or otherwise discriminating against any employee because he engaged in protected activity. The whistleblower provision incorporates by reference the burden shifting framework under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121(b). *See* 49 U.S.C. § 20109(d) (2) (A).

49 U.S.C. § 20109(a) and 29 C.F.R. § 1982.102(b) (1) protect an employee who: (1) provides information to Federal, State, or local regulatory or law enforcement agencies, a member of Congress, GAO member, or a supervisory authority regarding any conduct which he reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security; (2) refuses to violate or assist in the violation of any Federal law, rule or regulation relating to railroad safety or security; (3) files an FRS complaint or participates in a FRS proceeding; (4) notifies the railroad carrier or Secretary of Transportation of a work-related personal injury or illness; (5) cooperates with a safety or security investigation; (6) furnishes information to Federal, State, or local authorities relating to any railroad transportation accident resulting in injury or death, or damage to property; (7) accurately reports hours on duty pursuant to chapter 211 and, reports, in good faith, a hazardous safety or security condition.

Second, 49 U.S.C. § 20109(b) and 29 C.F.R. § 1982.102(b) (2) provide protection for an employee who reasonably refuses to work when confronted with hazardous safety or security conditions related to the performance of his duties or refuses to authorize use of equipment, track or structures in hazardous safety or security conditions. Under this provision, railroad security personnel are also protected when reporting a hazardous safety or security condition.

Third, 49 U.S.C. § 20109(c)(2) and 29 C.F.R. § 1982.102(b) (3) protect an employee who requests medical or first aid treatment or follows orders or a treatment plan of a treating physician. However, a railroad carrier's refusal to permit an employee to return to work following medical treatment is not considered a violation of this provision if the refusal is based on FRA's or a railroad carrier's medical standards for fitness for duty.

The complainant carries the initial burden of establishing the elements of his claim by a preponderance of the evidence. To establish his burden, the complainant must show the following elements by superior evidentiary weight:

(i) The employee engaged in a protected activity or conduct;
(ii) The employer knew or suspected, actually or constructively, that the employee engaged in the protected activity;
(iii) The employee suffered an unfavorable personnel action; and

(iv) The circumstances were sufficient to raise an inference that the protected activity was a contributing factor in the unfavorable action.

29 C.F.R. § 1979.104(b) (1) (i) – (iv); *see also Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037 at 13 (ARB Jan. 31, 2006) (defining preponderance of the evidence as "superior evidentiary weight"), *Clemmons v. Ameristar Airways, Inc.*, ARB Nos. 05-048, 05-096, ALJ No. 2004-AIR-11 (ARB June 29, 2007), and *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003 (Jan. 30, 2004). A complainant's failure to prove by a preponderance of the evidence any one of these elements requires dismissal of his complaint. 29 C.F.R. § 1982.104(e) (1).

A complainant is not required to provide direct evidence of discriminatory intent; he may satisfy his burden through circumstantial evidence. *Evans v. Miami Valley Hospital*, ARB Nos. 07-118, -121, ALJ No. 2006-AIR-22 (ARB June 30, 2009), *Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-028, slip op. at 12 (ARB Nov. 30, 2006). In circumstantially-based cases, the fact finder must carefully evaluate all evidence of the employer's agent's "mindset" regarding the protected activity and the adverse action taken. *Timmons v. Mattingly Testing Services*, 1995-ERA-40 (ARB June 21, 1996). The fact finder should consider "a broad range of evidence that may prove, or disprove, retaliatory animus and its contribution to the adverse action taken." *Id.* at 5. Circumstantial evidence of causation may be established if the employer's stated reason for the action is determined to be pretext.[31] In other words, it is proper to examine the legitimacy of an employer's reasons for taking adverse personnel action.[32] Proof that an employer's explanation is unworthy of credence is persuasive evidence of retaliation because once the employer's justification has been eliminated, retaliation may be the most likely alternative explanation for an adverse action.[33] Such pretext may be shown through an employer's shifting or contradictory explanations for the adverse personnel action.[34] Other examples of circumstantial evidence which may demonstrate pretext or that a protected activity was a contributing factor include: temporary proximity between the protected activity and adverse personnel action;[35] the magnitude of controversy leading up to the adverse personnel action generated by the protected activity;[36] a supervisor's disregard for safety procedures;[37] the

[31] *Speegle v. Stone & Webster Construction, Inc.* ARB No. 06-041, 2005-ERA-006, slip op. at 9 (Sept. 24, 2009); *see also Zinn v. University of Missouri*, 1993-ERA-34 and 36 (Sec'y Jan. 18, 1996); *Shusterman v. Ebasco Servs., Inc*., 1987-ERA-027 (Sec'y Jan. 6, 1992); *Larry v. Detroit Edison Co*., 1986-ERA-032 (Sec'y Jun. 28, 1991); and, *Darty v. Zack Co*., 1980-ERA-002 (Sec'y Apr. 25, 1983).
[32] *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (Jan. 31, 2006).
[33] *Florek v. Eastern Air Central, Inc.*, ARB No. 07-113, ALJ No. 2006-AIR-009, slip op. at 7-8 (May 21, 2009).
[34] *Negron v. Viegues Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 8 (Dec. 30, 2004), and *Hobby v. Georgia Power Co.* 1990-ERA-030, slip op. at 9 (Sec'y Aug. 4, 1995).
[35] *Stone & Webster Eng'g Corp. v. Herman,* 115 F.3d 1568, 1573 (11th Cir. 1997).
[36] *Seater v. So. Cal. Edison Co.*, ARB No. 96-013, ALJ No. 1995-ERA-013, slip op. at 4 (Sept. 27, 1996).
[37] *Nichols v. Bechtel Const. Co.* 1987-ERA-044, slip op. at 11 (Sec'y Oct. 26, 1992), *aff'd sub nom. Bechtel, supra,* 50 F.3d 926 (11th Cir. 1995).

disproportionate harshness of the unfavorable personnel action considering the employee's work record;[38] and disparate treatment between complainant and similarly situated employees who did not engage in protected activity.[39]

Section 20109(a) specifically prohibits adverse personnel actions of discharge, demotion, suspension, reprimand, or any other discriminatory action. In addressing adverse employment actions, in *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-002 (ARB Sept. 2008), setting aside its precedent of requiring an adverse personnel action to have a tangible employment consequence in terms of compensation and condition of employment,[40] and in light of the standard established by *Burlington Northern & Santa Fe Railway Co. v. White,* 548 U.S. 53, 67-57 (2006),[41] the Administrative Review Board determined that to constitute an unfavorable personnel action, the employment action must be "materially adverse" such that it is harmful to a point that it might dissuade a reasonable employee from making or supporting a charge of discrimination.[42] One of the considerations in determining whether an action is materially adverse is its effect on pay, terms, and privileges of employment. Other considerations include the permanency of the action, other consequences, and the context within which the action arises.[43] Additionally, an unpaid suspension which is later revoked with restored pay may still be considered an adverse personnel action.[44]

The Administrative Review Board has held that it is proper to examine the legitimacy of an employer's reasons for taking adverse personnel action in the course of concluding whether a complainant has proved by a preponderance of the evidence that protected activity contributed to the adverse action. *Brune v. Horizon Air Industries, Inc.,* ARB No. 04-037, ALJ No. 2002-AIR-8 slip op. at 14 (ARB Jan. 31, 2006) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792

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[38] *Overall v. TVA*, ARB Nos. 98-111 and 128, ALJ No. 1997-ERA-053, slip op. at 16-17 (Apr. 30, 2001), *aff'd TVA v. DOL*, 2003 WL 932433 (6th Cir. 2003).

[39] *Speegle,* ARB. No. 06-041, slip op. at 13 (according to the Administrative Review Board to satisfy the "similarly situated" requirement, a complainant must establish that the complainant and other employees are similarly situated in all relevant aspects).

[40] *See Jenkins v. U.S. Environmental Protection Agency*, 1992-CAA-006 (Sec'y May 18, 1994) citing *DeFord v. Secretary of Labor*, 700 F.2d 281, 283, 287 (6th Cir. 1983).

[41] In *Burlington Northern*, the Supreme Court concluded that a change in work assignment without a change in pay and restored 37 days of unpaid suspension constituted adverse personnel actions.

[42] Applying these principles in *Melton*, the Administrative Review Board determined that a warning letter admonishing an employee not to use fatigue as a subterfuge to avoid work was not materially adverse because it did not affect pay, terms or privileges of employment, did not lead to discipline, was removed without consequences and would not dissuade a reasonable employee from refusing to drive because of fatigue. The majority opinion equated the "tangible harm" and "materially adverse" standards which are often used "interchangeably." Citing *Griffith v. Wackenhut Corp*., ARB No. 98-067, ALJ No. 1997-ERA-052, slip op. at 12 (ARB Feb. 29, 2000), the Board stated that "Actions that cause the employee only temporary unhappiness do not have an adverse effect on compensation, terms, conditions, or privileges of employment."

[43] *Burlington Northern & Santa Fe Railway Co.,* 548 US at 69, ("the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters").

[44] *Id.* at 71-72.

(1973)). Proof that an employer's explanation is unworthy of credence is persuasive evidence of retaliation because once the employer's justification has been eliminated, retaliation may be the most likely alternative explanation for an adverse action. *See Florek v. Eastern Air Central, Inc.*, ARB No. 07-113, ALJ No. 2006-AIR-9, slip op. at 7-8 (ARB May 21, 2009) (citing *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 147-48 (2000)).

Temporal proximity can support an inference of retaliation, although the inference is not necessarily dispositive. *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 03-AIR-22 slip op. at 9 (ARB Nov. 30, 2005). For example, when an independent intervening event could have caused the adverse action, it would be illogical to rely on the temporal proximity of the protected act and the adverse action. *See Tracanna v. Arctic Slope Inspection Serv.*, ARB No. 98-168, ALJ No. 97-WPC-1, slip op. at 8 (ARB July 31, 2001). Also, where an employer has established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee's burden to show that his protected activity was a contributing factor. *Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ No. 2002-AIR-19 (ARB Apr. 28, 2006).

The Board has recently held that a complainant is not required to show retaliatory animus (or motivation or intent) to prove that his protected activity contributed to a respondent's adverse action. Rather, one must prove that his report was a contributing factor to the adverse action. Focusing on the motivation of [the respondent] would impose on a complainant an incorrect burden of proof. *DeFrancesco v. Union Railroad Co.*, ARB No. 10-114, ALJ No. 2009-FRS-9 (ARB Feb. 29, 2012).

> The ARB has said often enough that a 'contributing factor' includes 'any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.' The contributing factor element of a complaint may be established by direct evidence or indirectly by circumstantial evidence. Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity.

DeFrancesco, supra. *See also, Smith v. Duke Energy Carolinas LLC*, DOL ARB No. 11-003, (6/20/12) [released 7/2/12](The ARB has fully adopted the interpretation of "contributing factor" as set out in *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993).[45]

[45] In *Marano*, the Federal Circuit interpreted "contributing factor" in the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 5 U.S.C. 1221(e) (1), to mean "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Marano*, 2 F.3d at 1140. The term was intended to "overrule existing case law, which require[d] a whistleblower to prove that his protected conduct was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action in order to overturn that action."

Preliminarily, an implicit component of the element, "contributing factor," is knowledge of the protected activity. Generally, demonstrating that an employer, as an entity, was aware of the protected activity is insufficient. Instead, the complainant must establish that the decision makers who subjected him to the alleged adverse action were aware of the protected activity.[46]

If a complainant establishes all of the elements, the burden then shifts to the employer to rebut the elements of the claim by demonstrating through clear and convincing evidence that it would have taken the same personnel action regardless of the protected activity. 49 U.S.C. § 42121(b) (2) (B) (ii); 29 C.F.R. § 1979.104(c). If the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity, then relief may not be granted the employee. 29 C.F.R. § 1982.104(e) (4); *see also Barker v. Ameristar Airways, Inc.,* ARB Case No. 05-058 (ARB: Dec. 31, 2007), slip op. at 5; *Hafer v. United Airlines, Inc.,* ARB No. 06-017 (ARB: Jan. 31, 2008), slip op. at 4.

FINDINGS OF FACT

The matter has come to this stage because of over-lapping and poorly-defined railroad rules resulting in subjective interpretations, failure to reach important understandings, miscommunication between management and union members, and the relative intransigence of the parties. The evidence establishes that UP, its managers, UP employees and Union members are all very concerned about safety, as they should be. UP's Safety Hotline is one manifestation of UP's concern about safety as is UP's FTX testing program. UP's KCSU General Superintendent recognized that when he agreed to Mr. Pfeifer's use of the Hotline to report rough track in order to have the follow-up actions documented and communicated. Further, as Mr. Pratt acknowledged, Hotline use is encouraged as employees know their jobs and see things mangers do not see. (TR 697, 736). Moreover, UP has established rules which if properly implemented serve to promote safety. One of the more important rules, Rule 6.21.1, requires train crews to immediately notify the dispatcher of the discovery of any defect or condition that might cause an accident or what they believe is any dangerous defect they have passed over.[47] Rule 1.1.3 requires reports, by the "first means of communication," of defects in track or "any unusual condition that may affect the safe and efficient operation of the railroad." (EX K).

The parties agreed that "rough track," such as that repeatedly reported by Mr. Pfeifer, constitutes a safety hazard. Expert Mr. Dennin established there is no federal definition of "rough track;" it is somewhat of a subjective determination but if there is ever any question, it must be reported. (TR 579-582, 597). In Mr. Pfeifer's view, the rough track he reported, in particular on 7/3/2010, was neither a "defect" nor did it involve any immediate danger or

[46] *See Gary v. Chautauqua Airlines,* ARB No. 04-112, ALJ No. 2003-AIR-038 (Jan. 31, 2006) and *Peck v. Safe Air Int'l, Inc.,* ARB No. 02-028, ALJ No. 2001-AIR-003 (Jan. 30, 2004).

[47] Track defects are identified in federal track standards and include rail fractures, splits, weld separations, cracks, and flattened rails. 49 C.F.R. § 213.113. Rough track is not included.

possibility of an injury or accident; rather he believed it was merely a "maintenance" issue. (TR 42-3, 142-3). Had any of the rough track he reported needed immediate attention, i.e., it was "extremely rough," he would have notified the dispatcher. (TR 136-8). His interpretation of Rule 6.21.1 was not unreasonable as it requires reports to a dispatcher when the condition "might cause an accident' or a crew member believes it is a "dangerous defect." A plain reading of that rule did not require him to notify the dispatcher in that instance. Thus, management's interpretation of that rule, absent the stipulation, was ill-considered. But, UP's rules must be read together.

Rule 1.13 has a much lower threshold for immediate reporting, i.e., "any unusual condition that may affect the safe and efficient operation of the railroad." (Emphasis added). Rough track is not the normal state of the track, as evidenced by the fact that not many portions of the track were observed to be "rough." Rough track falls within Rule 1.13's definition. This is particularly true given the parties' stipulation. Given their stipulation, the potential disastrous impact of a track defect laid out in the testimony, and Rule 1.13, it was quite reasonable for UP managers, i.e., Mr. French, to insist Mr. Pfeifer immediately report rough track to a dispatcher.[48] Moreover, UP's protocols for acting on such reports, i.e., establishing a 10 mph speed limit followed by an immediate inspection, etc., are commendable. It was not unreasonable for Manger French, on July 12, 2010, to propose formally "coaching" Mr. Pfeifer for this dereliction, i.e., not reporting rough track to a dispatcher. No one proposed any adverse action for his use of the Safety Hotline. While the Hotline report may have "contributed" to the proposed coaching, under the Board's expansive precedent, it was not the basis for the proposed coaching, but rather the basis was Mr. Pfeifer's failure to make an immediate report to the dispatcher.[49] Even if the Hotline report was found to be "inextricably intertwined" with the proposed corrective action, UP has proven, by clear and convincing evidence, that it would have coached Mr. Pfeifer in the absence of the Hotline report. Moreover, the complainant has not proven pretext. In fact, Mr. French, who had encouraged Hotline use, subsequently thanked Mr. Pfeifer, in writing, for his later compliance. Obviously, Mr. French knew of the Hotline reports. However, under *Melton*, it resulted in no materially adverse employment action.

Mr. Pfeifer and Union officials believed that UP was not properly addressing such reports by train men. They wrongly perceived that UP could not detect the defects the former experienced in their multi-ton engines with the high-rail trucks UP subsequently dispatched to

[48] "The environmental whistleblower protections do not deprive employers of the right to require employees to tell them immediately about hazardous conditions." *Sayre v. Veco Alaska, Inc.*, ARB No. 03-069, ALJ No. 2000-CAA-7 (ARB May 31, 2005), citing *see Hall v. United States Army,* ARB Nos. 02-108, 03-013,ALJ No. 1997-SDW-00005, slip op. at 23 n.15 (ARB Dec. 30, 2004).

[49] The Hotline report was merely incidental temporally to the proposed coaching but did not precipitate it. UP does not consider coaching to be disciplinary and it does not result in any loss of pay, benefits, or privileges of employment. (TR 325; 761). I note there is no evidence of even one UP employee being disciplined for Hotline use.

inspect for defects and that UP was not properly following up on their reports by not informing employees. Mr. Pfeifer discussed this with their General Superintendent, in June 2010. As a result of their misperception, Mr. Pfeifer and other employees continued to report "rough track" on the Safety Hotline to precipitate follow-up documentation, after reporting it to the dispatcher as required by the rules and management. It appears this may have concerned at least one of the managers who then suggested that Hotline reports were unnecessary and redundant as the report to the dispatcher had already ensured the reported area was inspected well-before the Hotline reports would have reached the relevant actors. That inspection and/or remediation occurred was, in fact, the case. Moreover, as Mr. Pratt pointed out, the propriety of the use of the Hotline by some employees, i.e., Mr. Newman who recorded some 150 Hotline reports in a brief period was at best questionable. On August 10, 2010, Mr. French sent a written "thank you" to Mr. Pfeifer for complying with the reporting rules. (CX 16). While the reports of rough track to the Safety Hotline constituted "protected activity," the law is not so blind as to preclude management from stating the obvious, i.e. that duplicative Hotline reports were unnecessary.[50]

Unfortunately, it is not shown whether Mr. Pfeifer and his fellow Union members were aware that the UP track maintenance employees, i.e., Mr. Guatney and crew, inspected all the track in the KCSU every day. Nor was it shown they were aware of the precise and intricate inspections they were able to perform after arriving at the reported site in their high-top vehicles. As established by the eminently-qualified Mr. Dennin, only trained track repair experts are qualified to measure and assess tracks. (TR 561-3). Had they been so informed, perhaps their concerns would have been allayed and they would not have continued to test the system. None of Mr. Pfeifer's reports ever demonstrated track in need of repair.

As well-established, UP's FTX testing program also serves a significant safety purpose. As Mr. French pointed out, such tests are designed to try to recreate real life situations train men would encounter and to assess how they react. The FTX testing program was one of long standing. General Superintendent Mr. Corcorin testified it sets the standard and enhances safety, as Mr. Nowlin said. (TR 478, 460). UP is proactive and tests around the clock. (TR 690). The FTX Manual states FTX testing may not be used to "entrap" employees or for retaliation. (TR 446). Moreover, as Mr. Dennin II, testified, the industry's General Code of Operating Rules ("GCOR") and 49 C.F.R. § 217.9 requires efficiency testing with the goal of ensuring compliance in order to reduce accidents. (TR 551-3, 567, 582; EX AU). Mr. Johnson shows FTX testing is used to ensure rules compliance, evaluate employee skills, and serve as an educational opportunity. (TR 604). It is not unusual for a manager to conduct twenty tests a month. Mr. French established that UP tries to test employees a minimum of once every 120 days. (TR 306).

[50] UP, citing a litany of cases involving employees' "flagrant" misconduct, argues that the Hotline reports here, were not done in "good faith," and thus cannot qualify as protected activity. (Respondent Brief at 7). Given the ambiguity of UP's various rules, I do not find flagrant misconduct here. However, it is proven that Mr. Pfeifer was promoting a Union position.

Mr. Pratt, who is responsible for developing testing plans and implementing them, established that he reviewed three years of human factor incidents, coordinated that with GCOR rules, and determined and issued a minimum number of FTX tests to be conducted. (TR 684). He assigned the weekly testing requirements to 48 managers and posted information, quarterly, on what would be tested and incidents that might have occurred. (TR 686). Mr. Johnson and Mr. Pratt established that managers must meet their testing quotas; so if one waited until the end of the month testing toward the end of the month would necessarily be heavier. (TR 605, 686-7). Employees are not "selectively" tested. (TR 741). It is established that train men are busy with other rules testing for the first half of the year and thus more FTX tests occur in the second half. (TR 689). Moreover, UP's KCSU's "Summer Spike" and "Holiday Havoc" testing periods reflect increased testing during periods when employees tended to be more lax. (TR 689-692). Such increased testing is UP's "best avenue" to avoid human factor incidents. (TR 688).

Mr. Johnson testified that the purpose of FTX testing is to ensure compliance with UP's rules, evaluate employee skills, and serve as an educational opportunity. (TR 604). There is a required testing frequency per position, i.e., about twenty per month; so if a manager waits until the last week of the month, he must do the tests then. (TR 605). UP tests for: speed, authority, slow orders, limits of authority, documentation, and identification. (TR 606). The type of testing depends on whether UP has had incidents, e.g., a derailment. (TR 607). The KCSU requires FTX testing on every five-mile increment of track for the entire territory. (TR 608). Managers decide on where and how to test (but not whom) and sometimes testing is concentrated where the most train traffic is. (TR 609). For example, Marysville, where Mr. Pfeifer worked, has 50-60 trains per day. (TR 609). Some trains must be let by without testing to avoid stacking them up and specific employees are never targeted. (TR 610-611). In setting up tests, Mr. Johnson testified that he does not know which trains will come through; all he does is pick a location to do the testing. (TR 630).

The UP employees who testified, including Mr. Pfeifer, had all previously been the subjects of multiple FTX tests. (See, e.g., CX 56). The parties agreed that the Complainant was field tested ("FTX") on August 4, 2010 by Messrs. French and Mendoza, August 10, 2010 by Mr. French, twice on August 12, 2010 by Mr. French, August 17, 2010, September 8, 2010, September 11, 2010 by Mr. French, September 26, 2010, October 20, 2010 by Messrs. French, Johnston and Mendoza, October 21, 2010, November 29, 2009, and December 5, 2009. In setting up tests, Mr. Johnson testified that he did not know which trains will come through; all he does is pick a location to do the testing. (TR 630). Mr. Johnson testified that on October 20, 2010, he, Mr. French, and Mr. Mendoza, conducted testing in one location involving several trains. (TR 612-615). They set up an end-of-track-authority test for the next train, which unknown to them happened to be Mr. Pfeifer's. (TR 616). It is not established that Messrs. Johnson or Mendoza knew of the complainant's Hotline earlier reports; Messrs. French, Pratt and Albrecht did.

Mr. French admitted that being tested twice in one day was not an "every-day occurrence," but was not unusual. (TR 332). Mr. Nowlin said it was. (TR 446). Mr. Pfeifer testified he had never before been FTX tested five times in one month, as he had in August 2010, and was not aware of any other employee who had been; thus, he suspected the tests were in retribution for his 7/3-8/8/2010 Hotline reports. Between July and October, Mr. Pfeifer claimed he was FTX-tested ten times, whereas in the four months before his Hotline reports, he had been tested only four times. (TR 101-102). Yet, on cross-examination, he admitted he was tested three times in January 2010, four times in February, never in March, twice in April, once in May, once in June, not in July, but could not recall if he had made Hotline complaints during that time. (TR 146-149, 171; EX BL). So, he was tested eleven times between January and June 2010, before he had made any Hotline complaints, then eleven times between July 1 and December 31, 2010. While he and others may not have been FTX tested five times in one month before, he had been tested four times in February 2010. Moreover, the latter part of the year involved the "Summer Spike" and "Holiday Havoc" periods. CX 56 reflects that Mr. Pfeifer was and had been routinely FTX tested.

Mr. Midgely felt he had been "targeted" for a yellow-board FTX test after he had complained about such tests. (TR 392-3). But, he had no objective proof. Conductor Callahan testified that after making two Hotline reports, in August 2010, he had three August FTX tests which he felt were retaliatory because he had been tested only thrice between January and August. (TR 424-429). While their perceptions are understandable, they are established as fact. But, union official and conductor Mr. Bonawitz, who is responsible for keeping safety records and monitoring Hotline reports, testified that there were months in which he was not FTX tested and other months when he was tested three times. (TR 386).

Having reviewed EQMS data for FTX testing of 600-800 KCSU employees between July 1 and December 31, 2010, Mr. French testified that other trainmen's FTX testing had increased, for example, Mr. Armstrong was tested eleven times between October and November 2010; Ms. Allison was tested ten times between October and November 2010; Mr. Bolin was tested five times between August and September 2010; Mr. Quinn was tested thirteen times between November and December 2010; Mr. Stang was tested thirteen times between September and October 2010; Mr. Boos was tested six times between August and September; and, Mr. McElyea was tested eleven times between November and December 2010. (TR 317-319). Moreover, Mr. Pratt examined the FTX testing records for 2010 and observed that Mr. Pfeifer had not been among the top one-third of the employees in the KCSU tested; nor was he the most-coached. (TR 719, 733-5, 744; EX BF). Thus, I find the empirical data and non-subjective evidence does not support Mr. Pfeifer's contention that he was subjected to increased FTX testing between July 3 and December 31, 2010. In fact, he had not been tested more in the second half of 2010 than he had been during the first half of 2010. It is established that other employees had been tested

more frequently, particularly in the second half of 2010. Thus, I find disparate treatment between the complainant and other similarly situated UP employees has not been established.

Had UP subjected Mr. Pfeifer to increased FTX testing as a result of his Hotline reports, it could have constituted an unfavorable personnel or employment action of the type proscribed since repeated violations of the same rules could start the disciplinary process and had increased FTX testing been shown to be a consequence of engaging in protected activities it could have been "materially adverse," i.e., dissuade reasonable employees from making or supporting charges of discrimination. However, given the testimony related to how the number and type of FTX tests are established and the monthly quotas assigned to managers to conduct, the fact that tests might be grouped at the end of a month, the relatively random nature in which the crews on trains were tested, the fact that UP requires testing on every five miles of its KCSU tracks, the fact some trains are not tested to maintain the traffic flow, that managers test where the trains are or are grouped, that managers Johnson and Mendoza did not know of the complainant's Hotline reports, as well as UP policies against "targeting" or selection of specific individuals for testing, establishes that neither Mr. Pfeifer nor his co-employees, who testified, had been "targeted" for FTX testing and that the testing was not by any means retaliatory, performed as a consequence of protected activities, or in any way contributed to by the complainant's protected activities. Even Mr. Bonawitz said he could not say if employees who made Hotline reports were subjected to more FTX testing. My conclusion applies equally to the end-of-track-authority test of October 20, 2010.

When a UP employee did not pass a particular FTX test, the employee could be "coached" or "conferenced." Coaching could be either formal, i.e., documented, or informal. The coaching and conferencing were not "discipline" per se, under UP's progressive disciplinary program. UP's Director of Labor relations, Mr. Phillips, established that neither informal nor formal coaching is considered discipline by UP. (TR 761-3). However, Mr. Nowlin believed a Level 2 formal coaching would constitute a "black mark" on an employee's record. (TR 440). I note that the coaching form itself states that excessive violations "will" - not "can" result in disciplinary charges. (CX 78). I find, under the Administrative Review Board's recent precedent, that such coaching or conferencing, whether formal, informal, documented or undocumented, could constitute an unfavorable employment action of the type contemplated. However, as discussed further herein, I do not find that the coaching and conferencing, related to FTX testing, were undertaken as a consequence of Mr. Pfeifer's protected activities or that his protected activities contributed, in any way, to the coaching or conferencing.

The Complainant's field test evaluation records indicate that, based on testing results, he was "conferenced" or "coached:" on August 4, 2010 (passed test but conferenced for Rule 1.47C infraction); twice on August 12, 2010 (passed whistle test, but coached or conferenced for failure to make "stop" entry in log during structured stop test); once on August 17, 2010

("yellow board" test-exception taken to "YB" versus "RSR" log entry); once on September 11, 2010 (conferenced for failing a passing train inspection test for not radioing "highball"); once on September 26, 2010; and once on October 20, 2010 (conferenced for not entering end-of-track-authority in log). (ALJ EX III). In the first half of the year, he testified he had only failed one February FTX test. (EX BL). Additionally, Mr. French attempted to initiate a Level 2 formal coaching on July 12 for the July 3, 2010 failure to report rough track to the dispatcher.[51] Mr. Pfeifer did not accept the coaching for the 7/3/2010 event and the matter was dropped through the exercise of "leniency." I find that under the Administrative Review Board's recent precedent, as the matter was "dropped" and no formal record made, it did not constitute an unfavorable employment action of the type contemplated. As discussed elsewhere herein, I do not find that it was undertaken as a consequence of Mr. Pfeifer's Safety Hotline report, but rather legitimately because of his failure to report the rough track to the dispatcher immediately. Moreover, I do not find the complainant established that Mr. French said he would take him out of service, that he would "adjust his schedule," or would "see you in the field."[52]

CX 64 was prepared by the Complainant's counsel, from a document depicting testing data for 7/1/2010-12/31/2010, for nearly 500 conductors. (CX 52; CX 59). CX 64 is a pie chart covering July through only October 2010.[53] (TR 132). It reflects that: 285 conductors or 65% were never coached; 116 or 27% only received one coaching; 32 or 7% were coached twice; five conductors were coached three times; and, fewer than 1% (Mr. Pfeifer) were coached six times. (TR 122-123). However, Mr. Pratt, who had examined 2010 FTX testing records, found Mr. Pfeifer had not been among the most coached. (TR 719, 733-5, 744; EX BF). Mr. Pratt testified that he had queried UP's computer records, EQMS, regarding testing on Rule 1.47A, for which only conductors are tested, for the period of 5/20/2007 through 11/6/2011, in the KCSU. (TR 702-3).[54] 2,129 such tests were conducted with 1,838 conductors passing and only 289 coached. (EX AY; TR 711, 717). 1,949 other structured tests were conducted with 65.6 percent associated with a "stop" test; more than 10 percent had trouble passing. (TR 718). One cannot ascertain from EX AY which part of Rule 1.47A was violated. (TR 730). Even Mr. Pfeifer's limited summary reveals that some two-thirds of UP's conductors had been coached in the short period of July through October 2010, five of whom had been coached three times, plus Mr. Pfeifer who was coached six times. Likewise, Mr. Pratt's review showed that more than 58 percent of UP's KCSU conductors had been coached during 2010. I thus conclude that "coaching" or "conferencing" of UP's employees, just like testing, is a common practice and not at all unusual,

[51] CX 78 is a blank representative Level 1-2 coaching form. The form states that excessive violations of level one or two rules will result in disciplinary charges of violating Rule 1.13, failure to comply with instructions. (TR 56). Mr. Phillips said although it is infrequent, repeated rules violations could possibly result in a higher level of discipline. (TR 763, 776).

[52] Mr. French denied ever saying these things.

[53] Merely recapitulating a subset of the 7/1-12/31/2010 data could result in results skewed to make a party's point. I must assume the data concerning the remaining time period was not favorable to the Complainant.

[54] The Respondent agreed the listing could inexplicably contain the names and results for up to two dozen engineers. (TR 715).

as are failures.[55] However, one must determine whether Mr. Pfeifer was subjected to either greater scrutiny during the FTX tests or to an unusual failure rate and, if so, if it was as a consequence of his protected activities.

As far as the "stop" FTX tests to which Mr. Pfeifer was subjected, on August 4th and August 12th, and ended up being coached or conferenced on, Mr. Pratt testified that more than 10 percent had trouble passing one in all of 2010. (TR 718). Mr. Pfeifer passed an August 10, 2010, FTX test administered by Mr. French. (TR 427). His 8/12 infractions, for which he was conferenced, involved failure to make a "stop" entry in his log during a stop and whistle test. On August 17, 2010, a "yellow board" test- an exception was taken for a "YB" versus "RSR" log entry. He passed the 9/8/2010 FTX test. On September 11, 2010, he was conferenced for failing a passing train inspection test for not radioing the word "highball." Mr. Pfeifer testified that most conductors will not radio the term "highball" unless they observe some defect on the passing train.[56] No testimony was adduced concerning the September 26, 2010 coaching and Complainant indicates he passed. On October 20, 2010 he was conferenced for not entering end-of-track-authority in his log. As far as the October 20, 2010, Rule 1.47A testing for which Mr. Pfeifer was conferenced, Mr. Pratt related that the 2010 data concerning all such tests showed failures or coaching in 289 of 2,129 tests (about 13.5%). He passed the October 21, 2010 FTX test by Mr. Johnson.

The October 20, 2010 Rule 1.47A testing incident for which Mr. Pfeifer was conferenced appears somewhat typical of his testing and the results.[57] There, the testing involved end-of-track-authority. When the head of the train was only a half mile from Mile Post 76, the end-of-authority, Mr. Pfeifer, who knew the managers were about to board the stopped train, chose not to make an entry in his conductor's log book to memorialize his call to the engineer about the end-of-track-authority. Undoubtedly, the rule relating to the requirement of the earliest time to make such an entry, i.e., when "approaching" end-of-track-authority, is less than completely clear, but the very last opportunity, when the "head of the train is at or about," is clearer, although not completely free of potentially differing interpretations. (Rule1.47A). In expert Dennin's opinion, UP's Rule 1.47, required the conductor, in this case, to tell the engineer about the end of authority two miles before Mile Post 76 and likewise log it then. (EX J; CX 9; TR 575, 588-592). Mr. Daniel Whitthaus, the UP Superintendent of the adjoining St. Louis Service Unit, who handled Mr. Pfeifer's disciplinary case related to the October 20, 2010 infraction,

[55] EX P, UP Railroad Policy & Procedures for Ensuring Rules Compliance, defines formal and informal coaching and conferencing. Informal coaching does not go in one's record. Formal coaching and conferencing do not establish a new level of discipline. It does not appear that Mr. Pfeifer's conferences, other than for the October 20 incident, followed the "conferencing" rules and may not have actually constituted "conferencing."

[56] Complainant concedes a radio communication is required by rule. (Brief at 16).

[57] Rule 1.47A deals with the duties of the conductor. Under subpart 3, he must inform the engineer of the limits of their track authority after the train passes the last station, "but at least two miles from the restriction." Subpart 5 deals with the Conductor's Report Form or log. It requires logging when "approaching" the end of authority, but explicitly when the "head end of the train is at or about the milepost location of required entry."

found Mr. Pfeifer had violated Rule 1.47A by failing to log the end-of-track-authority. (EX J; TR 783). Mr. Whitthaus knew nothing about Mr. Pfeifer other than what he read in the file related to the proceeding.[58]

I reject the view that Mr. Pfeifer was to make the entry two miles before the end-of-track-authority because the rule does not state that; rather the conductor must merely communicate the matter to the engineer then. Subpart 5 of the Rule is clear that the last opportunity to properly log the end-of-track-authority is when the "head end of the train is at or about the milepost location of required entry." (Emphasis added). But, it also requires logging when the train is "approaching" the end-of-track-authority or is at or "about" the end. It appears the actual requirement or practice at UP's KCSU had not established that required point; nor could Mr. Dennin as a general industry practice. Although having been written-up before for what may seem to a layman to be minutia, i.e., logging "YB" versus "RSR", and knowing the rules, rather than playing it safe and making the entry one half mile from the end of his authority, Mr. Pfeifer chose to "test" or confront the ambiguity. While it is true the Rule has some room for interpretation and Mr. Pfeifer may have been right, rather than accept management's not unreasonable interpretation, he told them he did not give a sh*t or at best, that he did not care. That reported comment certainly affected Mr. Whitthaus' subsequent opinion. As I say, this incident illustrates Mr. Pfeifer's conduct during the FTX testing; doing it his way or according to his interpretation of sometimes less than clear rules and prompting confrontation. Moreover, Mr. Pfeifer's intemperate language, in his correspondence with management, i.e., referring to their "Gestapo" actions and calling them liars, illustrates a lamentable confrontational attitude and a tendency to exaggerate his claims. Thus, I cannot find that Mr. Pfeifer was subject to an unfair or undue number of conferencings or coachings. He violated UP's rules, in managements' opinion, and that is proven to legitimately merit the conferencing or coaching to correct the conduct.

The evidence related to UP's FTX testing and its consequent actions, i.e., coaching or conferencing, shows a consistent and non-disparate application of its policies and focus on safety. The employer's witnesses' testimony, which I find credible, reflects a consistent application of UP's policies. Although some testifying employees may have felt that they might have been singled out, that merely reflects their limited perspective of the actual facts. Moreover, I do not find a change in the employer's attitude toward Mr. Pfeifer after he made his Safety Hotline reports. In fact, Messrs. Corcorin, Guatney, Whitthaus, Johnson, Phillips, Pratt, all demonstrated professionalism during the time period involved and in their testimony. I likewise find Mr. French's testimony both credible and professional.

Mr. Pfeifer had certainly made Safety Hotline reports of rough track on four occasions between 7/3/2010 and 8/8/2010. The only time he did not first report the rough track to the dispatcher was on 7/3/2010. However, I cannot find the fact that these occasions may have

[58] Thus, the individual taking final action on the discipline had no knowledge of Mr. Pfeifer's protected activities.

overlapped in temporal fashion alone establishes the necessary causal link of any relation to or between his FTX testing and their attendant coaching and conferencing and his protected activities. Moreover, given that Mr. Pfeifer's failure to report the rough track to the dispatcher, on July 3, 2010, could have resulted in a far greater safety consequence, i.e., without limits on speed and a qualified inspection with any requisite remediation, UP has established, by clear and convincing evidence, that Mr. French's proposed coaching, on July 12, 2010, was undertaken for legitimate reasons and the same action would have been undertaken even absent Mr. Pfeifer's Hotline report.

In short, UP has established, by clear and convincing evidence, legitimate reasons for the proposed coaching, the FTX testing, the consequences of the testing, and the disciplinary proceeding and consequences thereof for the October 20, 2010 rule violation.

CONCLUSIONS

While the complainant had engaged in protected activities, i.e., by making Safety Hotline reports about rough track, it is not established that those activities contributed to UP's coaching, FTX testing and consequent actions in any way. For safety reasons, UP's rules require reports of railroad track anomalies be made immediately to a dispatcher in order to place speed limits on those sections and allow for inspection and possible repair by specially-qualified inspectors and repairmen. Moreover, it is not established, as discussed above, that UP managers who conducted the testing and the one who brought the disciplinary charge for the October 20, 2010 rule infraction had knowledge of Mr. Pfeifer's Hotline reports. Mr. Whitthaus, the superintendent of an adjoining UP service unit, who acted on the suspension without pay charge, had no knowledge of the complainant's protected activities. UP established that both its FTX testing of the complainant and the consequent results thereof, i.e., coaching or conferencing, were not contributed to in any way by his protected activities. UP has established that it would have taken the same actions in the absence of the protected activities. No pretext is proven. Finally, it is noted that the Public Law Board has overturned the formal disciplinary action.

ORDER

IT IS ORDER THAT the complaint is DISMISSED.

A

RICHARD A. MORGAN
Administrative Law Judge

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

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

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

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

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

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

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition

is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1982.110(a) and (b).