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

Issue Date: 31 December 2012

CASE NO.: 2012-FRS-00012

In the Matter of:

MARK BAILEY,
Complainant,

v.

CONSOLIDATED RAIL CORPORATION,
Respondent.

Before: Colleen A. Geraghty, Administrative Law Judge

Appearances:

Brian Reddy, Esq. and Donald J. Kral, Esq., The Reddy Law Firm, Maumee, Ohio, for the Complainant

Robert S. Hawkins, Esq. and Joseph P. Sirbak, II, Esq., Buchanan, Ingersoll & Rooney, P.C., Philadelphia, Pennsylvania, for the Respondent.

DECISION AND ORDER

I. STATEMENT OF THE CASE

This case arises from a complaint filed by Mark Bailey (the "Complainant") with the Department of Labor's Occupational Safety and Health Administration ("OSHA") against Consolidated Rail Corporation (the "Respondent" or "Conrail")[1] under the employee protection provisions of the Federal Rail Safety Act (the "FRSA"), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. 110-53, 121 Stat 266 (Aug. 3, 2007). On December 5, 2011, the Secretary of Labor ("Secretary"), acting through her agent, the Regional Administrator for OSHA, found that the Respondent did not violate the FRSA. On January 4, 2012, the Complainant objected to the

[1] Pursuant to an Order issued on April 11, 2012, Norfolk Southern Railway Company and Norfolk Southern Corporation were dismissed with prejudice as parties in this matter.

Secretary's findings and requested a *de novo* hearing before the Office of Administrative Law Judges ("OALJ").

A hearing was held before the undersigned Administrative Law Judge in Detroit, Michigan on May 8, 2012, at which time the parties were afforded the opportunity to present evidence and arguments. Documentary evidence was admitted as Joint Exhibits ("JX") 1-9, Respondent Exhibits ("RX") 1, 3, 6, 8, 12-15, and 21, and Complainant Exhibits ("CX") F, I, J, L, P, Q, V, Y (page 2), BB - EE, II, MM, UU, WW, AAA, EEE-1, EEE-2, and GGG.[2] H'rg Tr. ("TR") 5, 102, 169, 181, 223-25, 229, 281, 292-93, 296, 300, 334, 504-05, 510, 585, 587-90, 625, 703, 725, 761. Testimony was heard by the Complainant, and Conrail employees Brian McBain, Kenneth McIntyre, Patrick Unger, Robert Conley, Jr., Alvin Coles, Robert Collop, John Vaccaro, Joseph Price, Sandra Compo, and Joseph Flanley. The Respondent submitted the deposition of Dr. Patel post-hearing, and it is admitted into evidence as RX 22. TR 505. The record is now closed, and the parties submitted post-hearing briefs ("Compl. Br." and "Resp. Br." respectively).

The Complainant alleges that his suspension, investigation, and ultimate dismissal from employment were in retaliation for protected activity that he engaged in while employed with Conrail. Specifically, the Complainant asserts he was retaliated against for the following alleged protected activity: (1) reporting a work-related injury on August 3, 2010; (2) testifying on June 15, 2010, and executing an affidavit on May 25, 2010, in a case arising under the Federal Employers Liability Act ("FELA"); (3) filing numerous written safety complaints; and (4) calling the ethics and compliance hotlines of both Conrail and Norfolk Southern Corporation ("Norfolk Southern") on December 17, 2010.

II. STIPULATIONS

In the parties' Joint Pre-Hearing Stipulation, they stipulated to the following undisputed facts:

1. Conrail is a railroad carrier subject to the employee protection provisions of the FRSA;

2. The Complainant was employed as a conductor by Conrail since December 21, 1998. As a conductor, he was responsible for ensuring the safe and efficient operation of his train, among other responsibilities. As a conductor, he is represented by the United Transportation Union (the "UTU"). At no time has the Complainant been represented by the

[2]The Respondent objected to CX J on relevance grounds and to CX P on hearsay grounds, both of which were overruled. TR 291, 296. The Complainant objected to CX DD and RX 15 for any truth of the matter asserted; CX DD was admitted for the fact that Mr. Vaccaro prepared the document, and the objection for RX 15 was overruled. TR 588-89. The Complainant also objected to RX 3 on relevance grounds, and after a discussion off the record, the exhibit was admitted in full. TR 624-25. Exhibits CX Q, CX J, CX BB, CX CC, CX Y, CX EE, and RX 12 were not admitted for the truth of the matter asserted. TR 223, 291, 296, 586-88. CX Q was admitted for the fact that it was signed by the Complainant. TR 223. CX J was admitted for the fact that it was included as part of a document and for the Complainant's state of mind. TR 291. CX BB and CX CC were admitted for the fact that Mr. Unger prepared more than one version of the document. TR 333. RX 8 was admitted as follows: as to the recitation of the nature of the Complainant's complaints, it comes in as a business record, and as to the issues handwritten on the right hand side of the columns, it is not submitted for the truth of the matter asserted. TR 702-03.

Brotherhood of Locomotive Engineers and Trainmen (the "BLET"), which represents the separate craft of locomotive engineers;

3. The Complainant most recently reported a work-related injury on August 3, 2010;

4. On June 15, 2010, the Complainant testified in a deposition on behalf of the plaintiff, James Kermins, in a case arising under the Federal Employers Liability Act ("FELA"). The Complainant also executed an affidavit in the Kermins litigation on behalf of Mr. Kermins on May 25, 2010;

5. During the period from June 29, 2010 through February 8, 2011, the Complainant made approximately 35 formal written safety complaints;

6. On December 17, 2010, the Complainant called the ethics and compliance hotlines of both Conrail and Norfolk Southern;

7. On February 11, 2011, the Complainant said to Trainmaster Robert Conley, the Complainant's supervisor, "do you want to tangle with me?";

8. After meeting with Mr. Conley and Kenneth McIntyre (Detroit Area Superintendent), the Complainant was removed from service on February 11, 2011;

9. Conrail scheduled an investigatory hearing for February 25, 2011 in connection with the charge of "conduct unbecoming an employee of Conrail and your violation of Conrail SA Order AD 0.06, Threats or Acts of Violence in the Workplace, part 4.2, when at approximately 7:15 a.m. on February 11, 2011 in the lunchroom at the Livernois Yard Office Building you threatened Trainmaster Robert Conley, Jr., by among other things, stating: "Do you want to tangle with me?";

10. After six postponements, which were granted at the request of the Complainant's union representative, the Complainant's investigatory hearing was conducted on February 16, 2012 before Hearing Officer Bruce Patterson;

11. The transcript of the investigatory hearing was sent to Joseph W. Price, Manager of Fields Operations, for review. On February 29, 2012, Mr. Price sent a notification to Mr. Bailey informing him that he was dismissed from service with Conrail in all capacities, effective immediately;

12. On or about March 21, 2011, the Complainant filed a whistleblower complaint under the FRSA with OSHA. On or about December 5, 2011, OSHA issued its Secretary's Findings concluding the Complainant's complaint to be without merit. On or about December 29, 2011, the

Complainant filed his Notice of Objections/Request for Hearing initiating the instant proceeding; and

13. The Kermins case was settled between the parties on January 28, 2011.

OALJ 1.

III. ISSUES PRESENTED

The parties agree that the Complainant engaged in protected activity by filing numerous safety reports and by filing a report of injury on the job. TR 156; Resp. Br. 30 n.23. The parties also agree that the Complainant's discharge constituted an adverse action in this matter. *Id.* The issues remaining in dispute are as follows: (1) whether the Complainant engaged in protected activity by calling Conrail's fraud and ethics hotline and by participating in a co-worker's FELA case; (2) whether the Complainant's protected activity was a contributing factor in his removal from service and dismissal from employment; and (3) whether the Respondent would have taken the same adverse action in the absence of protected activity by the Complainant.

Based on the record as a whole, I find that the Complainant's protected activity of filing safety reports was a contributing factor in the Respondent's decision to suspend and ultimately dismiss the Complainant from employment. I further find that the Respondent failed to prove that it would have taken the same adverse action in the absence of the protected activity, and thus the Complainant is entitled to relief under the FRSA.

IV. BACKGROUND

A. Testimony

1. Complainant's Testimony

Mark Bailey was born on August 18, 1969. TR 149. He became employed at Conrail in 1998, and remained employed there for 12 years. TR 149. He testified that overall he enjoyed working at Conrail and for the most part, he got along well with his co-workers. TR 150-51.

i. Alleged Protected Activity

The Complainant testified to filing various written safety reports/complaints with the Respondent. TR 238. He acknowledged that it was the regular practice of the area superintendent, Mr. McIntyre, to return either directly or through a trainmaster, the safety complaints he filed with an explanation of how the safety issue was resolved. TR 233. He also acknowledged that in a few safety reports, the Complainant's supervisor, Mr. Patrick Unger, had written "please notify me in the future if this happens again." TR 238; RX 14 at 20-21. The Complainant testified that in December of 2010, Mr. McIntyre told him to "quit sending in the goddamn safety reports." TR 160. The Complainant acknowledged that he interpreted this statement as Mr. McIntyre not wanting him to report safety complaints in written form. TR 161.

The Complainant also testified and provided an affidavit in a FELA case brought by a co-worker, James Kermins, in June 2010. TR 156-57; CX Q. The Complainant testified that no one from Conrail discouraged him from participating in that case or criticized him for such. TR 232.

The Complainant also filed a report of injury on August 3, 2010 as a result of his exposure to fumes. TR 169; *see* RX 1.

The Complainant testified that he called the fraud and ethics hotlines for Conrail and Norfolk Southern on December 17, 2010. TR 164-65; *see* CX F; CX I; CX J. He complained that he was "unfairly badgered and harassed." TR 165. He also reported that his union local general chairmen, Mr. Collop, told him that Mr. McIntyre and Mr. Unger "were trying to bait [the Complainant] into an argument in an informal hearing, and have [him] escorted off the property by the . . . police."[3] TR 165, 215-16, 240.

ii. The February 11, 2011 Incident

The Complainant testified that on the morning of February 11, 2011, he encountered Mr. Conley, a trainmaster and the Complainant's immediate supervisor, in the lunchroom. TR 183. There were approximately 15 employees from the Maintenance of Way department present at the time.[4] TR 183. Mr. Conley said "good morning" to the Complainant and in response, the Complainant testified that he "just politely nodded my head and I was going to b-line right back to the locker room to get some more gear to get out to work." TR 183-84. Mr. Conley said "or not" as the Complainant was leaving the lunchroom. TR 184. The Complainant testified that he turned around and "just politely came back a little bit, not far, maybe a step or two out of the doorway, and I just said Bob, if it's work related, you know, let's talk by all means. But I don't want to socialize." TR 184. The Complainant testified that in response, Mr. Conley made clear that he could talk to "whoever he wanted to when he wanted to." TR 185. The Complainant testified that Mr. Conley "wasn't screaming at me but . . . he got his point across." TR 185. The Complainant testified that he then "politely walked to the locker room." TR 185-86. He went to the crew room to call the dispatcher for his work instructions. TR 186. Meanwhile, according to the Complainant, Mr. Conley continued to talk to him from the lunchroom, loudly enough so that the Complainant could hear him. TR 187.

As the Complainant turned around to return to the lunchroom, Mr. Conley was still talking to him. TR 187. At that point, the Complainant said "Bob, do you want to tangle with me?" TR 187. When he made this statement, he was approximately 10 to 12 feet away from Mr. Conley. TR 188. He stated that he did not make any physical gestures when he made the statement. TR 188. Mr. Conley paused for several seconds and then said "you're threatening me." TR 189. Mr. Conley flipped open his cell phone and walked out of the lunchroom, past the Complainant. TR 189. The Complainant "just kind of smirked like a small laugh . . . and just kept walking." TR 191. He testified that he did not intend to intimidate or physically harm Mr. Conley. TR 200.

After Mr. Conley walked out of the lunchroom, the Complainant continued to prepare for work. TR 190. Mr. Conley returned and told the Complainant that Mr. McIntyre wanted to see him in his office. TR 190, 618. The Complainant "responded okay." TR 190. The Complainant asked a co-worker, Brian McBain, to go with him to Mr. McIntyre's office as a witness. TR 191.

[3] The Complainant acknowledged that he would have to say or do something inappropriate in response to whatever management said to him for Conrail to take him out of service. TR 239.

[4] The Maintenance of Way employees later signed a statement indicating that they did not witness anything unusual occur in the lunchroom that morning. JX 8 at 354-55.

Mr. Conley was directly in front of the Complainant and Mr. McBain as all three walked up the stairs to Mr. McIntyre's office. TR 192. In Mr. McIntyre's office, Mr. McIntyre told the Complainant that he was making it "very hostile around here." TR 192. The Complainant told Mr. Conley "if you misconstrued what I just said downstairs that I was threatening you . . . I apologize to you because that's not what I mean." TR 192. Mr. Conley rejected the apology. TR 192. Mr. McIntyre told the Complainant and Mr. McBain to go downstairs and wait for a decision. TR 192. They waited 45 minutes until Mr. Conley came down and brought them back upstairs. TR 193. The Complainant said that as soon as he walked into the office, Mr. McIntyre told him he was taken out of service pending an investigation. TR 194. Mr. McIntyre "flicked" two or three of the Complainant's safety reports across his desk at the Complainant. TR 194, 272. The Complainant testified that Conrail's responses to the complaints were filled in on the safety reports. TR 272.

Mr. McIntyre sent the Complainant downstairs with Mr. Conley and as they left the office, the Complainant asked Mr. Conley why he was out of work and Mr. Conley responded "Rule D and Rule 940." TR 194. After giving Mr. Conley his radio and switch key, the Complainant left the property unescorted. TR 196. He was eventually informed that he was dismissed from employment. TR 204. The Complainant believes that the fact that he filed safety reports and testified in the FELA case played a role in his removal from service on February 11, 2011 and his ultimate dismissal. TR 217.

The Complainant testified that he had an "impeccable" working relationship with Mr. Conley up until January 2011, when the Complainant requested a meeting with his yardmaster, Mr. Coles, and Mr. Conley to discuss a safety issue. TR 163. The Complainant testified that in response to his safety concern, Mr. Conley said "if I didn't like my job I should just quit[]." TR 154, 163. He testified that "something wasn't right about that for Bob Conley to say that to me." TR 154, 163. The Complainant acknowledged that he had on several occasions told various management officials that he did not want to speak with them unless it was work-related, although it was not an "every day thing." TR 199, 232-33. He acknowledged that he told Mr. Conley not to speak with him about non-work-related matters following Mr. Conley's comment that he should quit his job. TR 200.

iii. Prior Incidents

The Complainant testified about an incident that occurred in 2001 in which he wrote a report alleging that he was threatened by yardmaster Earl Hardy. TR 211-12; *see* JX 6. Mr. Hardy was not taken out of service as a result of the Complainant's report. TR 211-12.

The Complainant also testified to an incident that occurred on December 14, 2010. TR 243. He had a doctor's appointment that day and had made a "calculated guess" that he would be done work before the appointment. TR 243. He ended up working longer than he had planned and had to leave work early to make his appointment. TR 244. He called the yardmaster, Mr. Coles, and asked to be relieved of duty. TR 244. Prior to his shift that day, the Complainant had told Mr. Coles about the appointment and had pre-arranged with him that morning that if they ran late, he would be able to be relieved from his duty. TR 244-45. A few days later, the Complainant was questioned by Mr. McIntyre about the incident, with a union representative present. TR 245. During the meeting, Mr. McIntyre asked why the Complainant did not tell

anyone about the doctor's appointment beforehand and the Complainant informed Mr. McIntyre that he had told Mr. Coles that morning. TR 246. The Complainant was not disciplined. TR 245.

The Complainant also testified regarding an incident that occurred on July 7, 2010. TR 172. Glenn Downie from Dearborn Steel, a customer of Conrail, called Mr. Coles to inquire why Conrail did not pull cars out of a particular track that day. TR 172. The Complainant was the conductor on the train in question. *See* CX II; CX MM. The Complainant testified that he talked to Mr. Downie in Mr. Coles' office on a company phone, while Mr. Coles sat next to him. TR 171. He testified that "at no time ever did I disrespect Glenn." TR 171. He testified that subsequent to the call with Mr. Downie, Mr. Coles called him, telling him that Mr. Unger had come to his office and attempted to get him to say that the Complainant used profanity in his conversation with Mr. Downie. TR 206. Mr. Coles told Mr. Unger that this did not happen and he wrote a statement upon the Complainant's request stating that the Complainant did not use profanity or disrespect the customer or any trainmasters. TR 206; CX Y. The Complainant also wrote down his version of his conversation with Mr. Downie after speaking with Mr. Coles on the phone. TR 304; CX L.

The Complainant testified on August 3, 2010, the same day he filed an injury report, he was required to attend a meeting with Mr. Unger, Mr. Vaccaro, and Mr. McIntyre. TR 169-70; *see* RX 1.[5] The Complainant asked the engineer on the job that day, Robert Tasker to accompany him to Mr. McIntyre's office. TR 170. The Complainant testified that during the meeting, the injury report, which he had filed earlier that day, was not mentioned. TR 170. Mr. McIntyre instead counseled the Complainant on the Dearborn Steel complaint. TR 170-71; CX II. The Complainant testified that this was the first time he heard about the complaint. TR 205. He testified that he was not disciplined as a result of the Dearborn Steel issue. TR 254. After the conversation in Mr. McIntyre's office on August 3, 2010, the Complainant sent Mr. McIntyre an email requesting a copy of the accusatory letter from Mr. Downie to Conrail, but he was never provided a copy. TR 175; CX MM.

iv. Counseling and Psychiatric Treatment

Commencing in January 2011, prior to the alleged threat, the Complainant sought counseling with Mr. Pollack and continued to seek treatment until September 1, 2011. TR 201, 258. He testified that he wanted to get his workplace concerns "off his chest" and he had a lot of anxiety about management trying to fire him. TR 201, 203. The Complainant acknowledged that he was experiencing anger prior to the alleged threat because of unresolved issues at work and some of his counseling involved techniques for managing his anger. TR 257, 264. The Complainant acknowledged that he had informed Mr. Pollack prior to the alleged threat that resolution of the work conflict was "legal." TR 258. The Complainant saw Mr. Pollack approximately 27 times, and paid a co-pay of $15 per visit. TR 214. After the Complainant was taken out of service, Mr. Pollack referred him to Dr. Patel, a psychiatrist. TR 292; CX WW; CX GGG. He visited Dr. Patel approximately 7 times and paid a co-pay of $15 per visit. TR 214.

The Complainant testified that he felt worse after he was taken out of service, and experienced depression and self-worth issues. TR 203. He stressed about his finances and had difficulty sleeping. TR 204. He testified that he had a baby on the way. TR 203. He said that

[5] The injury report indicates that it was filed at 2:05 pm on August 3, 2010. RX 1.

"every moment of every day that's all I thought about was that they have taken my job away from me." TR 204. He testified that "the reality of my job being taken away from me after close to 15 years of service with the railroad was, that was a really strong reality check for me that you've taken my livelihood away from me." TR 203. He testified that he still deals with depression. TR 204. He does not believe he will be able to find another job because of his employment record with Conrail, and he testified that his wife is directly affected because she is now the sole financial provider. TR 204, 260. He testified that he has not been paid since he was taken out of work on February 11, 2011. TR 213. He joined his wife's health insurance after he lost his own insurance upon his dismissal, at a cost of $200 per month. TR 215.

2. Testimony of Brian McBain

Brian McBain has been employed as an engineer with Conrail for over 36 years. TR 45-46. He is also a special advisor to his local chairman of the Brotherhood of Locomotive Engineers and Trainmen.[6] TR 57-58.

Mr. McBain testified that he was present in the lunchroom on the morning of February 11, 2011 and witnessed the alleged threat made by the Complainant. TR 47. He testified that he and the Complainant were sitting in the lunchroom talking and waiting to begin work when Mr. Conley said "good morning" to them. TR 49. The Complainant did not respond to Mr. Conley and Mr. Conley added "or not." TR 49. Mr. McBain and Mr. Conley continued to talk and the Complainant left the room. TR 49. At some point, both Mr. Conley and the Complainant returned to the lunchroom and Mr. Conley attempted to talk with the Complainant again. TR 50. The Complainant asked Mr. Conley not to speak to him unless it was work-related. TR 50. Mr. McBain stated "that's when it started to escalate a little" and both Mr. Conley and the Complainant's "voices were raised." TR 50. The Complainant then said to Mr. Conley "do you want to tangle with me?" TR 50, 61. Mr. McBain testified that he did not think these words constituted a threat and interpreted the statement as meaning the Complainant would file a complaint letter. TR 47, 67. Mr. McBain testified that he did not observe the Complainant make any physical gestures. TR 51. Mr. Conley left the room, and the Complainant did not follow him. TR 52. Mr. McBain testified that he did not think he needed to get between the two men nor did he think that a fight would break out. TR 52-53.

Mr. Conley returned to the lunchroom and told the Complainant to come upstairs with him to Mr. McIntyre's office. TR 53. Mr. Conley, Mr. McBain and the Complainant all went to Mr. McIntyre's office. TR 53. Mr. McBain testified that he did not observe Mr. Conley to be shaking, to have a red face, or to be in fear at all. TR 53. Mr. McBain said that the Complainant apologized during the meeting. TR 54. The Complainant and Mr. McBain were both sent back downstairs for a time, then Mr. Conley came downstairs and told them both to return upstairs with him. TR 55. All three returned to Mr. McIntyre's office. TR 55. There were no police or security personnel present. TR 55. During this second meeting, Mr. McIntyre informed the Complainant that he was suspended for his threat. TR 55. Before the Complainant left the office, Mr. McBain testified that Mr. McIntyre "threw a couple of safety complaint . . . forms . . . tossed them across the desk and said here, I know you keep these." TR 55. Mr. Conley, Mr. McBain and the Complainant then walked back downstairs. TR 56. Mr. McBain testified that he was present at the meetings because he was a friend of the Complainant and was there when Mr.

[6] This is a different union than the one the Complainant is a member of, the United Transportation Union. TR 174.

Conley asked the Complainant to come upstairs. TR 60. That morning, after the incident, Mr. Conley asked Mr. McBain to write a statement regarding the alleged threat made by the Complainant. TR 460; JX 2.

Mr. McBain testified that it was well known on the railroad that the Complainant had written several safety reports, and he believed the Complainant wrote complaint letters as well. TR 50-51. Mr. McBain testified that there are often situations where voices are raised between employees and managers and that he has done it himself. TR 63. Mr. McBain testified that the encounter between the Complainant and Mr. Conley was "not as bad as some of the things that I have seen." TR 63. As an example, Mr. McBain testified that one time he yelled at his trainmaster and "backed him right into another room and continued yelling at him" and no disciplinary action was taken. TR 64. He testified that he did not know of any prior disputes involving Mr. Conley and that he never heard of a union employee threatening a supervisor. TR 67-68.

3. Testimony of Kenneth McIntyre

Kenneth McIntyre is an area superintendent at Conrail. TR 74. Prior to this position, he worked as an assistant superintendent from July 2006 until January 2012. TR 74. Mr. McIntyre was retiring 21 days from the date of the hearing. TR 637.

i. Safety Reports

Mr. McIntyre was aware that the Complainant had filed numerous reports regarding safety concerns on railroad property. TR 98. He testified that he asked the Complainant at one point "why he wouldn't give us a chance to go out and fix the safety defect just by coming to us and asking us, rather than making out the paper." TR 105. He continued "we were going to fix the item whether he asked me or he made out the paper. Because if it was a safety concern, we were going to fix it." TR 105. He testified that very few employees turn in formal safety reports because the supervisors take care of the problem right away. TR 629-30. He testified that the original intent of the forms was that they would be filled out if a problem was not fixed following a verbal complaint. TR 658. Mr. McIntyre denied ever telling the Complainant to stop sending in "goddamn safety reports." TR 676.

He testified that he took the Complainant's safety complaints seriously. TR 322, 395, 627. When he received safety complaints he would ensure that the department head in control of the repair employees corrected the item. TR 628. When the issue was fixed, he or the trainmaster would fill out the bottom of the form and provide a copy of it to the employee who had filed it so the employee knew that the item was fixed. TR 628.

ii. February 11, 2011 Incident

On the morning of February 11, 2011, Mr. McIntyre said he instructed the trainmasters to speak with all employees regarding a recent fatality at Norfolk Southern. TR 623. Mr. McIntyre testified that when Mr. Conley called him following the incident with the Complainant in the lunchroom, he was "extremely upset" and told Mr. McIntyre that the Complainant had threatened him. TR 121. Mr. McIntyre instructed Mr. Conley to bring the Complainant to his office. TR 122-23. He testified that it was part of Mr. Conley's job as a manager to deal with the situation, even if it was a potential safety concern for Mr. Conley. TR 124. He observed Mr.

Conley when he entered his office; according to Mr. McIntyre, Mr. Conley was extremely red in the face and his hands were shaking. TR 620. He testified that when Mr. Conley described what happened, his voice was cracking and shaking. TR 620. Mr. McIntyre asked the Complainant for his reply to Mr. Conley's statement and at that time, the Complainant said something along the lines of "well if that's what he thought, I apologize." TR 620. Mr. McIntyre asked Mr. Conley if he could accept the apology and Mr. Conley said no. TR 620. Mr. McIntyre did not think the apology was sincere because the Complainant "had no emotion, no reaction, no signs of remorse" and "[h]e just stated it as a fact." TR 653.

Mr. McIntyre testified that he did not feel threatened by the Complainant, who appeared "refined" by the time he entered the office. TR 620. He testified that he did not personally observe the Complainant display a lack of emotional control on the morning of the incident. TR 77. He did not witness any threatening behavior or comments. TR 120. In his opinion, when the Complainant was first brought up to his office, violence was not imminent and the Complainant had realized that he had made a mistake. TR 637.

After Mr. McIntyre asked the Complainant and Mr. McBain to step out of the office, he attempted to contact people at the railroad for guidance, but did not receive any answers that early in the morning. TR 620, 622. He stated that "in 42 years, I've never had to deal with something like this;" referring to an employee threatening a manager. TR 620-21, 654. Following the incident, and after sending the Complainant home, Mr. McIntyre asked local managers to provide him with any information they had of similar instances involving the Complainant. TR 133. Mr. McIntyre acknowledged that there were two versions of the statement prepared by Mr. Patrick Unger in response to his request. TR 134. Mr. McIntyre requested Mr. Unger take out a paragraph in the first version of his statement because it was not relevant to what he had requested. TR 133-34. He testified that he did not remember a third version written by Mr. Unger. TR 135. Mr. McIntyre testified that he had conversations with Mr. Flanley, who is in charge of labor contract compliance, and other individuals on how to phrase the charge against the Complainant since he had no experience with it. TR 626.

Mr. McIntyre testified that the alleged threat is the sole reason he took the Complainant out of service. TR 77. He testified that Conrail has a zero tolerance for threats of violence in the workplace and the policy has been in effect since at least 2005. TR 76, 79. He testified that he was the person responsible for enforcing the policy. TR 81. He acknowledged that under the policy, it is mandatory to contact the local police department in the event of a threat of imminent harm or violence. TR 86. He testified that he did not call the police on the day of the incident because he felt that once the Complainant was at his office, the threat was no longer imminent; he testified that he would have called the police if he thought the threat was imminent. TR 124-25, 672-73. Mr. McIntyre acknowledged that if he knew an individual was fired because of a threat, he probably would not hire that person. TR 107-08.

iii. Prior Incidents

Mr. McIntyre discussed a prior incident where a yardmaster reported that the Complainant had threatened him. TR 90-91. Mr. McIntyre estimated that the threat reported by the yardmaster occurred a year prior to the February 2011 incident with Mr. Conley. TR 91. Mr. McIntyre said that the yardmaster ended up withdrawing his complaint because he would not testify against a fellow union employee. TR 91. Mr. McIntyre testified that he did not follow the

zero tolerance policy in that situation because there was no evidence of a threat since the yardmaster had withdrawn his complaint. TR 92. He also testified that he received another report prior to February 2011 that the Complainant threatened a co-worker, Mr. Hensen. TR 96. He testified that he attempted to discuss the incident with Mr. Hensen but Mr. Hensen did not want to discuss it. TR 144-45. The investigation was not pursued. TR 97.

Mr. McIntyre also testified about the incident involving Dearborn Steel on July 7, 2010. Mr. McIntyre stated that there were allegations that the Complainant had talked inappropriately with the customer. TR 137; *see* CX MM. Mr. McIntyre testified that he discussed with Mr. Unger the fact that they may need the police present for the investigation/counseling of the Dearborn Steel complaint due to the Complainant's emotions. TR 87-88. Mr. McIntyre explained that the counseling on the Dearborn Steel complaint occurred sometime after the actual incident because they needed to investigate the complaint, gather information, and decide whether they should charge the Complainant. TR 634. Mr. McIntyre acknowledged that he counseled the Complainant on the Dearborn Steel complaint on August 3, 2010, the same day that the Complainant filed an injury report related to exposure to fumes. TR 98, 630-31; *see* CX II; RX 1. He did not know why it occurred on the same day, but testified that the counseling was not because of the fumes incident. TR 634, 675. He testified that the counseling occurred first thing in the morning before the Complainant went out to work. TR 665, 675. Mr. McIntyre acknowledged the existence of an email regarding the Dearborn Steel complaint and a handwritten notation on the email dated August 3, 2010 stating "conduct unbecoming of an employee." TR 141; CX Y. He acknowledged that the date of this handwritten note is the same date of the Complainant's report of injury. TR 141. He testified that the notation represented what the charge would have been if they had had enough evidence to pursue it. TR 634. He testified that the customer expressed reluctance to use its statements as evidence and that is one of the reasons why they counseled the Complainant instead of pressing disciplinary charges. TR 634.

Mr. McIntyre testified that after the February 2011 threat incident, he went through the Complainant's personnel file to review his past history. TR 112-13. While doing so he became aware of a complaint the Complainant had filed alleging that Mr. Hardy, the Complainant's supervisor, had threatened him. TR 111. Mr. McIntyre also testified that Mr. Unger had previously recommended that the Complainant be charged with two critical rule violations.[7] TR 635. He testified that in response to Mr. Unger's recommendation, he pulled video tapes and in his opinion, the evidence did not prove that the Complainant violated the rules as stated by Mr. Unger. TR 635-36.

iv. Mr. McIntyre's relationship with the Complainant

Mr. McIntyre testified that prior to the February 11, 2011 incident, he did not have a concern for his safety in the presence of the Complainant but "was a little concerned because [the Complainant] had displayed some emotion to me." TR 113-14. He testified that at one point he said good morning to the Complainant and he responded "don't talk to me unless it's official business." TR 114. Mr. McIntyre testified that he was concerned for his safety "at that particular

[7] A critical rule is a rule identified to prevent serious injury or death. TR 346. Mr. Unger testified that he observed the following critical rules violations: first, the Complainant got off his locomotive while it was still moving, and second, he never called for "three point protection" while he hung a marker. TR 346.

second" because of the Complainant's "demeanor and his facial expression and the tone of his voice." TR 118-19. He testified that he did not call employee relations after this incident nor did he bring disciplinary charges as a result. TR 119. He testified that before the February 2011 incident, he had told others to keep a vigil in the lunch area because of the Complainant's "violent emotions." TR 89-90.

4. Testimony of Patrick Unger

Patrick Unger was a trainmaster of Locomotive Engineers at Conrail and was not covered under a collective bargaining agreement ("CBA"). TR 309-10. He was terminated on September 29, 2011 for insubordination. TR 311, 313.

i. February 11, 2011 Incident

After the incident in the lunchroom on February 11, 2011, Mr. Unger said he called Mr. Conley to see what happened between him and the Complainant. TR 315. Mr. Conley told Mr. Unger that the Complainant ignored him after he said good morning and Mr. Conley responded "it is not a good morning." TR 316. Mr. Conley further told Mr. Unger that when he told the Complainant he needed to talk to him about his safety complaint, the Complainant turned to him and said "do you want to tangle?" TR 316. Mr. Conley told Mr. Unger that he responded "what did you say" and at that point the Complainant stepped towards him and "got fairly close." TR 316. Mr. Unger said that Mr. Conley told him that they were "almost nose to nose." TR 316.

Following the incident, Mr. Unger created a statement upon request by Mr. McIntyre to document his dealings with the Complainant throughout his career. TR 326. He testified that Mr. McIntyre had him remove language from his first version of the statement. TR 326. Some of the language that Mr. McIntyre had him remove regarded his opinion that the Complainant was a good conductor and knew his job well.[8] Mr. Unger got the impression that Mr. McIntyre was upset about what he submitted. TR 327-28. Mr. Unger submitted a second version, and Mr. McIntyre requested that he omit the first paragraph of the second version regarding Mr. Unger's management style.[9] TR 328; *see* JX 9.

ii. Prior Incidents

Mr. Unger discussed the July 2010 Dearborn Steel complaint and testified that Mr. Downie of Dearborn Steel had called him to complain about the language that the Complainant used when talking about the Complainant's manager, Mr. Vaccaro. TR 352-53. Mr. Unger asked

[8] There is no evidence of the first version of the statement. The witness testified that he could not find it on his personal computer. TR 343.

[9] The paragraph omitted stated the following:

> First off I would like to say, that I have been and will continue to be a fair but firm leader, this has more than once put me in the cross hairs of some of the agreement employees and their union reps. My non-scene [sic] approach to railroading and leadership lends itself to disagreements with employees when work is assigned. I believe we are all here paid to do a job and I make that expectation known. I try my best to treat all employees equally, fairly and with respect.

JX 9; RX 12; CX BB; CX CC.

Mr. Coles about the call, and Mr. Coles told him that when Dearborn Steel called, he was busy and handed the telephone to the Complainant. Mr. Unger testified "that was pretty much all I got from it all." TR 353, 359. Mr. Unger then sent an email to Mr. Flanley asking whether the conversation with Mr. Downie was recorded and if he could charge the Complainant without a recorded conversation. TR 354; CX MM. Mr. Flanley responded that they could charge him based on the customer's statement alone. TR 355.

Mr. Unger had a conversation with Mr. McIntyre and Mr. Collop, the union representative, regarding a possible counseling session for the Complainant on the Dearborn Steel complaint. TR 361; CX J. At the end of the conversation, Mr. Unger told Mr. McIntyre "if you tell this guy how to do his job, he may lose it . . . you can't tell Mark how to do his job or criticize him how to do his job or . . . he may tend to lose it on you." TR 362. Mr. Unger said "do it with me in the room and . . . if I'm not available, you may want to have one of the [police] officers at least in the building because I don't know if this guy may flip out." TR 362. He testified that neither he, Mr. McIntyre nor Mr. Collop suggested that they should provoke such an outburst from the Complainant. TR 362.

Mr. Unger testified that the fact that they counseled the Complainant regarding the Dearborn Steel issue on the same day he filed an injury report was "bad timing." TR 379. He testified that Mr. McIntyre's "first concern, in my opinion, should have been about the incident of the day" and he testified that he had no logical explanation for why the Complainant was not counseled for a month after the incident until after he filed an injury report. TR 381.

iii. Relationship with the Complainant

Mr. Unger testified that when he greeted the Complainant in the mornings, the Complainant would "typically just ignore you and look the other way and walk away" but "there's times he was cordial and would respond." TR 365. He stated that there were many occasions where he witnessed the Complainant lose his temper. TR 371. Mr. Unger testified that he and the Complainant "had quite a few disagreements." TR 322. He testified that he had a few disagreements with other employees as well. TR 323, 332. He was in the Marine Corp prior to working at Conrail, and he testified that he was a "fair and firm leader" at Conrail. TR 322. He testified that he was a strict disciplinarian and this often caused friction at work. TR 400-01. He testified that when he counseled the Complainant in the past, he never felt threatened by him. TR 389. He testified to one incident back in 2003 or 2004 when he had a conversation with the Complainant about the length of time it was taking him to perform his work. TR 365. In response, the Complainant asked him if he was sent over to fire them. TR 367. Mr. Unger stated that he was aware of the Kermins lawsuit in which the Complainant participated, as were other managers at the railroad, including Mr. McIntyre. TR 391-92.

5. Testimony of Robert Conley, Jr.

Mr. Conley has been an employee of Conrail for 20 years. TR 402-03. Mr. McIntyre hired him and was initially his supervisor. TR 403. Mr. Conley acknowledged that Mr. McIntyre was a personal friend of his father, and that he and Mr. McIntyre are also friends. TR 403-04.

i. February 11, 2011 Incident

On February 11, 2011, Mr. Conley said he went to the lunchroom to brief his crew on certain railroad risks and hazards following a recent fatality. TR 470. Mr. Conley testified that when he said good morning to the Complainant, he looked at him, non-aggressively.[10] TR 412. Mr. Conley responded "or not" when the Complainant was walking away from him. TR 412. In response, the Complainant told Mr. Conley that he would not talk to him unless it involved business. TR 413. The Complainant left the lunchroom, and Mr. Conley testified that he did not feel threatened at this time. TR 413-14. Mr. Conley stayed where he was and told the Complainant that he could talk to him, in a loud enough voice that the Complainant could hear him from the other room. TR 418. Mr. Conley testified that he was trying to explain to the Complainant that he could talk to him because it involved a business-related matter, but admitted that he never actually told the Complainant why he wanted to talk to him. TR 316, 471, 495. He testified that he did not repeat this statement over and over again. TR 473.

Mr. Conley testified that after he told the Complainant he could talk to him, the Complainant spun around and was "very aggravated." TR 419. The Complainant said "do you want to tangle with me?" TR 419. The Complainant's hands were down when he said this and "he was very rigid, stiff." TR 420. Mr. Conley testified that his posture "seemed aggressive." TR 420. Mr. Conley was about 20 feet away from the Complainant. TR 421. Mr. Conley was "shocked" and responded "what did you say?" TR 421. At that point, the Complainant took a step or two towards him and in a more aggressive voice repeated "do you want to tangle with me?" TR 421. Mr. Conley testified that the Complainant was "yelling at me like in an argumentative tone, not screaming but yelling." TR 422. He testified that this time the Complainant was "more tense, more violent in his voice, which honestly I was scared. I was scared real bad." TR 472.

Mr. Conley agreed that at no time during the incident were he and the Complainant closer than ten feet from each other. TR 422. Mr. Conley testified that he did not recall telling anyone that he was "nose to nose" with the Complainant. TR 423. He testified that after the Complainant said "do you want to tangle with me?" for the second time, Mr. Conley left the room and walked to the yardmaster's office. TR 423. He said at that point, he feared for his physical safety. TR 423. He said the first time he feared for his safety was after the Complainant said "do you want to tangle with me" for the first time. TR 424. He testified that he had to walk in the direction of the Complainant to leave the lunchroom because there were no doors in the back of the room and the Complainant was headed to the doors to his left. TR 424-25. He testified that "I thought he was going to come [at me] and if I didn't get out there that he would beat me up." TR 425. He acknowledged that the Complainant was not walking directly towards him, but to the left. TR 426. He testified that he was not in the state of mind to rationalize that the Complainant would not be coming to beat him up if the Complainant was moving to his left. TR 426. Mr. Conley testified that even after he had left the lunchroom and entered the hallway, he still believed that the Complainant would come after him. TR 434. He testified that the whole incident, from the time he said good morning until the time he entered the yardmaster's office to call Mr. McIntyre was 13 to 20 seconds. TR 468. He testified that he had no doubt that he was threatened that morning. TR 477.

[10] Later he testified that the Complainant rolled his eyes and "had a look of disgust on his face." TR 470.

Mr. Conley was aware of the zero tolerance policy that was in place at the time, but did not think he personally had to call the police. TR 414-15, 417. He called his supervisor, Mr. McIntyre, who told him to bring the Complainant upstairs. TR 439. He testified that he felt "very nervous" when Mr. McIntyre told him that. TR 439. He never requested that Mr. McIntyre call the police. TR 439. He returned to the lunchroom to tell the Complainant that Mr. McIntyre wanted to see the Complainant in his office. TR 439. He said that the Complainant did not relay any threatening gesture to him at that time nor did he say anything that indicated an intent to cause harm. TR 440. He testified that he was still in fear of the Complainant when he told him to go upstairs and while they walked upstairs together. TR 440-41. Mr. Conley testified that the Complainant had "calmed down a lot by the time we got upstairs. I was feeling a little more comfortable that his anger and aggression had pretty much passed." TR 449. However, he testified that he "still considered the threat just not as intense at that time." TR 449.

Mr. Conley admitted that at one point the Complainant tried to apologize to him and he told the Complainant he could not accept the apology. TR 450. He testified that he and Mr. McIntyre never discussed a concern about leaving the Complainant downstairs to wait for a decision, without supervision, after he allegedly threatened Mr. Conley. TR 451. After making the decision to take the Complainant out of service, Mr. Conley testified that he did not go downstairs to get the Complainant again, but rather someone called downstairs and asked the Complainant to come back up. TR 452. He testified that although he was concerned for his safety, he stayed in the office while the Complainant was informed that he was taken out of service. TR 453. He asserted that he continued to feel at risk of physical harm after the Complainant was suspended. TR 443.

Mr. Conley testified that no one told him he should try to incite the Complainant so that he would engage in misconduct. TR 477. He testified that he was not the person who made the decision to charge the Complainant and he just reported the incident. TR 476. He wrote a statement regarding the events of the confrontation. TR 448; JX 1. The statement did not indicate that the Complainant was in the other room, or that he was 10 feet away from the Complainant at the time of the alleged threat. TR 459-60; JX 1.

ii. January 2011 Meeting with the Complainant on Safety Concern

In early January 2011, Mr. Conley had a conversation with Mr. Coles and the Complainant, upon the Complainant's request, to discuss the Complainant's concern that not all the cars on the track were connected. TR 405. He testified that the Complainant "seemed very upset at Mr. Coles because Mr. Coles failed to let him know that there was a gap in the track" and the Complainant "had a safety issue with it." TR 481. During this conversation, Mr. Conley asked the Complainant "if you're so unhappy why are you here?" TR 406. He testified that it was a "simple question" and he did not mean anything by it. TR 406. He testified that the Complainant "seemed very displeased with everything that was going on," and "this had been going on for a while from what I noticed." TR 481. He testified that the Complainant "had become so unhappy with a lot of things that I asked him, you know, if it's so bad why are you here?" TR 481. He admitted that it probably was not the most professional thing to say. TR 487. He conceded that such a statement could discourage an employee from bringing further safety complaints, although he said that was not his intent. TR 488. He testified that he never told Conrail that the Complainant should leave, nor did he intend to force the Complainant out of Conrail. TR 481-82. He testified that in response to his question, the Complainant said

something to the effect of "well maybe I will not be here long." TR 484. He testified that he found no rule that the cars had to be connected, as the Complainant claimed. TR 489-90.

iii. Other Disputes or Confrontations at the Railroad

Mr. Conley testified that the Complainant had a tendency to become aggravated easily. TR 407. Prior to the February 11, 2011 incident, he had heard that the Complainant would not engage in conversations with certain managers and would tell them he would only talk to them about work-related matters. TR 408-09.

Mr. Conley acknowledged that he has had heated conversations with other workers in the past. TR 443-44. He explained that one co-worker would get very upset, yell at the yardmaster over the radio, and break his lanyard. TR 444. He testified that this employee was never dismissed from employment for such actions. TR 444.

6. Testimony of Alvin Coles

Alvin Coles is a yardmaster at Conrail and was in this position on the date of the February 11, 2011 incident. TR 508. He testified that on the day of the incident, he talked to Mr. Conley in his office about his daily work assignments and then Mr. Conley went into the lunchroom. TR 509. He testified that he heard Mr. Conley say good morning to the Complainant, then later heard the Complainant say "do you want to tangle with me," and a few other words which he could not remember, in a loud tone. TR 509, 512. He only heard the Complainant say "do you want to tangle" once. TR 513. He testified that the incident did not distract him from his normal work. TR 513. After the incident, Mr. Conley returned to Mr. Coles' office and he "appeared flustered" and "wasn't acting himself." TR 514. Mr. Coles did not say anything to Mr. Conley at that time. TR 515. Mr. Coles testified that based on what he heard of the incident, he did not personally think it was a situation of a serious nature, or a heated confrontation. TR 520-23. He was asked to write a statement on the same day upon request of Mr. Conley. TR 509-11; *see* RX 6.

Mr. Coles testified that he observed heated confrontations in the past and employees yelling at managers and he did not recall in any of these situations the employee being sent home and later terminated. TR 520.

7. Testimony of Robert Collop

Mr. Collop is a Locomotive Engineer at Conrail and is also the local general chairman for the United Transportation Union. TR 525. In his union position, he acts as the representative for the Complainant. TR 525. Mr. Collop testified that he met with Mr. McIntyre and Mr. Unger to discuss an email from Dearborn Steel complaining about the Complainant. TR 526. Mr. McIntyre told Mr. Collop that he did not want to discipline the Complainant, but wanted to talk to him about the email. TR 526. As Mr. Collop left the office, Mr. Unger said "well, yeah, and if he gets out of line, we'll have the police haul him out." TR 526. Mr. Collop interpreted Mr. Unger's statement to mean that if the Complainant got angry, Mr. Unger would pull him out of service and have the police escort him out. TR 527. Mr. Collop testified that there was no indication they expected the Complainant to lose his temper or that they wanted him to lose his temper. TR 528. He testified "that's just how [Mr. Unger] talks." TR 528. Mr. Collop told the Complainant about Mr. Unger's statement while they were working in the yard and warned him

to keep calm when he goes upstairs to talk with them. TR 526. Mr. Collop said that the Complainant called him at home that night requesting that he write a letter to the Complainant's lawyer stating that he heard Mr. McIntyre and Mr. Unger plotting to get the Complainant angry enough that he would be pulled out of service. TR 532. Mr. Collop said that he told the Complainant that is not what happened and that he was just trying to make sure "everything was cool" so that nothing happened. TR 532. He told the Complainant he would not write the letter. TR 532.

Mr. Collop represented the Complainant in the disciplinary investigation of the incident with Mr. Conley as it was his duty as the local union chairman. TR 534. At the investigation, Mr. Giulano, the union courtesy, told Mr. Collop that he intended to testify for the Complainant, testifying that Mr. Collop had told him that he overheard a conversation between Mr. McIntyre and Mr. Unger plotting to take the Complainant out of service. TR 533. Mr. Collop responded that he never told him that, he would never tell him that, and it was not true. TR 533.

8. Testimony of John Vaccaro

Mr. Vaccaro is a management employee at Conrail, and he worked with the Complainant at times during the course of his employment. TR 539. Some of the occasions where he worked with the Complainant were positive and some were not. TR 539. He maintained that he was very intimidated by the Complainant throughout the Complainant's employment at Conrail. TR 552. But he also testified that he would make bets on football games with the Complainant for "a can of pop" despite his alleged intimidation. TR 552-53. Mr. Vaccaro acknowledged that the Complainant filed an injury report in August 2010. TR 550. He testified he handwrote on the Complainant's personal injury report, the word "incident" because the Complainant did not need medical attention. TR 550-51; *see* RX 1. Mr. Vaccaro provided a statement for Mr. McIntyre regarding his history with the Complainant after Mr. McIntyre had suspended the Complainant. TR 554; CX BB.

He testified that when he was a trainmaster, there was a dispute between the Complainant and the yardmaster, Mr. Hardy that "became a heated conversation with just threats from Mr. Bailey and some might consider threats from Mr. Hardy." TR 543, 545. He testified that both the Complainant and Mr. Hardy were removed from service pending a formal investigation. TR 545. He believed that the police were notified about the dispute because they were already on site responding to an unrelated issue with a tank car. TR 545, 576. He wrote up a report for the police department as a result. TR 543; *see* RX 15. No charges were ever pressed against either employee.

Mr. Vaccaro also testified to a disagreement regarding a work assignment between himself and the Complainant in November 2010. TR 547; *see* CX DD. The Complainant pointed his finger and yelled at him, saying "stay away from me." TR 547. Mr. Vaccaro testified that the Complainant said "quit following me and go back to your, use of profanity, office." TR 547. Mr. Vaccaro said he just let it go because he did not want either one of them to have to report the incident and because he was afraid of dealing with the Complainant. TR 548. He testified "in reality, I figured if I would get him into trouble, I feared he [sic] to be, honestly, life threatening to me and I say that in all honesty." TR 548.

9. Testimony of Joseph W. Price

Mr. Price is the manager of field operations at Conrail. TR 591. He has been with the company for 13 years but only began working in the Detroit area on April 18, 2011. TR 591, 601. Mr. Price made the final decision to dismiss the Complainant after reading the transcript of the investigation hearing, which he received from Mr. McIntyre. TR 595-96, 598; *see* RX 8. Mr. Price testified that prior to reading this transcript, he did not have any information regarding the Complainant and had never met the Complainant. TR 599. He was not aware of any safety or injury reports made by the Complainant, his testimony in a FELA case, or any ethics complaints made by the Complainant. TR 599-600. He was not working in Detroit at the time of the February 11, 2011 incident. TR 600. He testified that based on the transcript, he found that there was aggression and Mr. Conley was afraid. TR 600. Mr. Price relied on the fact that the Complainant admitted he said "do you want to tangle with me." TR 600. He testified that "there was no doubt in my mind that this incident happened. And that's what I based my decision on. And, you know, obviously Conrail's policy is zero tolerance for threats and acts of violence. So, it wasn't that hard of a decision." TR 600. He testified that he did not evaluate the motivations of Mr. McIntyre or Mr. Conley and the transcript did not mention anything outside of the events of February 11, 2011. TR 608. He testified that at the time he rendered his decision, he had been working in Detroit for almost a year. TR 602. During this time, Mr. McIntyre was his supervisor, and he shared an office with Mr. McIntyre. TR 603. Mr. Price further testified that Mr. Conley reported to him the year before he made his decision. TR 603-04. Mr. Price testified that he did not receive exhibits with the hearing transcript. TR 605.

10. Testimony of Sandra Compo

Ms. Compo is employed at Conrail as a Director Assistant Corporate Secretary & Corporate Compliance. TR 680; CX F. She is involved in corporate governance, including company policies, company correspondence and communications. TR 680. She also handles the fraud and ethics hotline. TR 681. At trial, Ms. Compo discussed the company's policy against threats and acts of violence in the workplace, stating that the policy is "intended to prohibit words or actions that create a perception of harm or an intent to harm someone." TR 681. She testified that the focus is on the perception of the victim and that the victim must have a reasonable basis for their perception. TR 682, 747.

Ms. Compo testified that she received a complaint from the Complainant through the fraud and ethics hotline and she returned his call a few days later. TR 689. The Complainant talked about an incident where he left work early for a doctor's appointment and his superintendent talked to him about it. TR 689. He also told Ms. Compo that Mr. Collop told him there was a conspiracy between Mr. Unger and Mr. McIntyre to take him out of service. TR 689-90. Ms. Compo spoke with Mr. Flanley about the hotline complaint because it involved an union representative and he is familiar with all of the union representatives. TR 691. She referred her initial investigation to the chief legal officer and had no further role in the investigation of the Complainant's hotline complaint. TR 693.

Ms. Compo testified that upon request for references from prospective employers, the corporate policy is to only provide the dates of employment and the position held, and that Conrail does not provide information regarding discharge or termination. TR 694. The only way additional information would be provided is if the employee signs a release. TR 697.

11. Testimony of Joseph Flanley

Mr. Flanley is the senior director of labor relations and personnel and his responsibilities include the administration and negotiation of the company's CBA. TR 704. He testified that he investigated the February 11, 2011 incident, requested statements from individuals regarding the incident, and recommended the charge. TR 713. When he heard that this was not the first time that the Complainant threatened someone, he wrote an email requesting documentation to determine whether it would be appropriate to charge the Complainant with creating a hostile work environment. TR 715. He testified that he did not ultimately recommend charging the Complainant with hostile work environment. TR 718. He reviewed statements by Mr. Conley, Mr. Coles, Mr. McBain and the Maintenance of Way employees. TR 730. He also considered Mr. Conley's description of the incident on the phone and how he felt threatened. TR 730-31. Mr. Flanley stated that he did not believe the statement of the Maintenance of Way employees because "that happens all the time with groups of unionized employees . . . they write statements like that [i.e. that they witnessed nothing unusual]." TR 733. He testified that he did not obtain a statement from the Complainant because "he gets his day at the investigation." TR 736. He testified that he told Mr. McIntyre to take out a paragraph of Mr. Unger's statement because it did not involve the Complainant's alleged threat. TR 723. He testified that he never saw a third version of the document. TR 726.

Mr. Flanley testified that Mr. McIntyre decides whether charges should be brought; Mr. Flanley only recommends the charges. TR 729. He testified that removal from service is automatic for threats in the workplace. TR 716. He testified that in the internal hearing process, the hearing officer does not decide whether the employee accused of misconduct actually committed the misconduct. TR 711. The final charge states that the Complainant "threatened Robert Conley Junior, among other things." TR 739; *see* JX 4. Mr. Flanley testified that the "other things" included his physical movement towards Mr. Conley, his demeanor, and his raised voice. TR 739-40.

Mr. Flanley testified that Ms. Compo called him to tell him that she had received an ethics hotline complaint from the Complainant stating that Conrail was trying to fire him. TR 719. Mr. Flanley then called Mr. Collop to inquire whether it was true that he told the Complainant that Conrail was out to get him. TR 719. Mr. Collop told him it was not true and he simply told the Complainant to keep his cool in the event that he was called into a meeting with Mr. McIntyre and Mr. Unger. TR 720. He relayed this conversation with Mr. Collop back to Ms. Compo. TR 720.

12. Deposition of Dr. Hiten C. Patel

Dr. Patel is a general psychiatrist. RX 22 at 5. He testified that the Complainant was referred to him by a social worker, Mr. Pollack and that he is still treating the Complainant once every 2 to 3 months. *Id.* at 6, 8. He first met with the Complainant on March 22, 2011. *Id.* at 11. His office notes stated that the Complainant continued to experience anxiety, depression, difficulty sleeping, stress related to work issues, and tightness in his chest and arms. *Id.* at 9, 15-16, 18-19. The office notes stated that the Complainant denied hallucinations, delusions, and suicidal or homicidal ideations. *Id.* A September 2011 office note stated that the Complainant continued to have issues with work and was fearful for his safety after he returns to work. *Id.* at 17. Dr. Patel testified that they did not discuss anger management in their sessions. *Id.* at 21.

Dr. Patel testified that while he was treating the Complainant through September 2011, it was his view that the Complainant could not return to the railroad because he felt threatened there and was afraid for his safety if he returned to work. RX 22 at 17-18. He testified that apart from the railroad, the Complainant was able to perform other jobs at that time. *Id.* at 18. He testified that the investigative hearing had to be postponed because the Complainant was having difficulty concentrating and handling stress and he was emotionally unstable. *Id.* at 22. He testified that there was no prior history of psychiatric problems prior to the February 11, 2011 incident, based on the Complainant's statements. *Id.* at 23, 28.

Dr. Patel prescribed the Complainant anti-depressants. RX 22 at 24. His treatment consisted of a 45 minute initial intake interview and then 15 minute sessions. *Id.* at 25. He did not administer any psychological tests. *Id.* at 25-26.

B. Documentary Evidence

1. Safety Reports

The record contains evidence of over 35 written safety reports filed by the Complainant from June 29, 2010 to February 8, 2011. RX 14. Conrail responded to all of the safety reports, investigated the complaints and made the necessary repairs. *Id.* Mr. Vaccaro, Mr. Conley, Mr. McIntyre, and Mr. Unger all replied to various reports. *Id.*

2. Conrail's Policies

Conrail's "Threats or Acts of Violence in the Workplace" policy dated May 5, 2005 states:

> A threat or act of violence, bodily harm, or physical or verbal intimidation is defined as words or actions that either creates a perception that there may be an intent to physically harm persons or property, or that actually bring about such harm.

JX 7. The policy states that threats or intimidation by an employee "will not be tolerated" and the policy will be "strictly enforced." *Id.* Employees who violate the policy will be subject to disciplinary action up to and including dismissal. *Id.*

Employees must report violations of the policy to a non-agreement supervisor or to Employee Relations. JX 7. Employees must also contact the police in matters "involving a threat of imminent harm or violence." *Id.* Non-agreement supervisors receiving notice of a violation must contact Employee Relations. *Id.* Lastly, the policy states that to the extent possible, Conrail will not reveal the identity of the person reporting possible violations of the policy. *Id.*

Conrail's "Safety, Reporting and Compliance" manual dated April 20, 2006 states that Conrail is "committed to complete and accurate reporting of all accidents, incidents, injuries, and occupational illnesses arising from the operation of the railroad" in full compliance with the Federal Railroad Administration's accident reporting regulations. RX 13 at 359. It states that it follows the principle "in absolute terms" that harassment or intimidation aimed at discouraging employees from filing such reports will not be tolerated. *Id.* The policy is to be "strictly enforced." *Id.* at 360.

3. Notice of Dismissal

On February 29, 2012, the Complainant was notified that he was dismissed from employment in all capacities, effective immediately for "conduct unbecoming" and in violation of the company policy against threats in the workplace. RX 21. The notice stated that the Complainant threatened Mr. Conley "by among other things, stating: 'Do you want to tangle with me?'" *Id.*

4. Hotline Log

A log from Conrail's fraud and ethics hotline indicates that the Complainant called on December 17, 2010. RX 8. The log notes state that the Complainant complained that Mr. Collop told him that Conrail, particularly Mr. McIntyre and Mr. Unger, were plotting to take him out of service and fire him. *Id.* He alleged that since he testified in the FELA case, Conrail has been trying to find an excuse to fire him. *Id.* He also reported that Mr. McIntyre discussed with him the fact that he had a doctor's appointment and left work before the end of the shift. *Id.* The Complainant wanted to put Conrail on notice that "he will defend his rights under the law and labor agreements." *Id.* The log notes also indicate that someone from the hotline spoke with the Complainant on December 20, 2012, and that Mr. Flanley was contacted regarding the complaint and he looked into the allegations. *Id.*

5. Other Documentary Evidence

The record contains a letter dated November 5, 2005 from the president and chief operating officer apprising the Complainant that his work performance had been evaluated and that he is one of their outstanding employees. CX P.

A letter dated April 12, 2012 from the Complainant's psychiatrist, Dr. Patel, stated that he diagnosed the Complainant with "Major Depression, single episode, caused by the problems he was having at his workplace." CX WW. He found that the Complainant was unable to work because of his emotional issues and was medically disabled from work from March 22, 2011 until February 16, 2012. *Id.*

The record also establishes that an internal investigative hearing was originally scheduled for February 25, 2011, but due to postponement requests from the Complainant for medical reasons and based on Dr. Patel and Mr. Pollack's recommendations, it did not occur until February 16, 2012. CX EE; CX V; JX 8; TR 284.

His W-2 Forms submitted into evidence indicate that he earned $49,712.64 at Conrail in 2009 and $47,398.06 in 2010. CX AAA.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Whistleblower Protection under the FRSA[11]

Section 20109 of the FRSA prohibits railroad carriers engaged in interstate or foreign commerce or its officers or employees from discharging, demoting, suspending, reprimanding or in any other way discriminating against an employee for, among other actions: (1) providing information or assisting in an investigation regarding conduct which the employee reasonably believes constitutes a violation of Federal law, rule, or regulation relating to railroad safety or security; (2) "notify[ing], or attempt[ing] to notify, the railroad carrier . . . of a work-related personal injury or work-related illness of an employee;" or (3) "reporting, in good faith, a hazardous safety or security condition." 49 U.S.C. §§ 20109(a)(1),(4),(b)(1)(A). The FRSA whistleblower provision incorporates the administrative procedures found in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121. *See* § 20109(d)(2)(A)(i). Therefore, complaints under the FRSA are analyzed under the legal burdens of proof outlined in the AIR 21.

The burden-shifting framework set forth in AIR 21 requires a complainant to prove by a preponderance of the evidence[12] that: "(1) he engaged in a protected activity, as statutorily defined; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the unfavorable personnel action." *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-00009, PDF at 5 (ARB Feb. 29, 2012) (*citing* 49 U.S.C.A. § 42121(b)(2)(B)(iii); *Luder v. Cont'l Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-00009, slip op. at 6-7 (ARB Jan. 31, 2012)). A "contributing factor" is one that "alone or in connection with other factors, tends to affect in any way the outcome of the decision." *DeFrancesco*, ARB No. 10-114, PDF at 6 (*quoting Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-00052, slip op. at 5 (ARB Jan. 31, 2011)); *see also* OSHA, Interim Final Rule, *Procedures for the Handling of Retaliation Complaints Under the National Transit Systems Security Act and the Federal Railroad Safety Act*, 75 Fed. Reg. 53522, 53524 (Aug. 31, 2010) (*citing Marana v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)).

If a complainant proves that his protected activity contributed to the adverse action, the employer may avoid liability if it "demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of [the

[11] I note that the Respondent preserves for appeal purposes its contention that the Complainant's complaint should be dismissed based on the doctrine of election of remedies. Respondent argues that the doctrine precludes the Complainant from challenging the merits of his dismissal under both the employee protection provisions of the Federal Rail Safety Act and under the CBA provisions of the Railway Labor Act. The Administrative Review Board in *Mercier v. Union Pacific Railroad Co*., ARB No. 09-121, ALJ No. 2008-FRS-004 (ARB Sept. 29, 2011) recently interpreted the employee protection provisions at 49 U.S.C.A. § 20109(f) as permitting whistleblower claims to proceed concurrent with collective bargaining grievance procedures. In light of the Board's decision in *Mercier*, the Respondent's request that this claim be dismissed based on election of remedies is denied.

[12] The "[p]reponderance of the evidence is the greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." *Brune v. Horizon Air Indus.*, ARB No. 04-037, ALJ No. 2002-AIR-00008, PDF at 13 (ARB Jan. 31, 2006) (internal quotation marks omitted) (*quoting Black's Law Dictionary* 1201 (7th ed. 1999)).

protected activity]." 49 U.S.C. §§ 42121(b)(2)(B)(iv), 20109(d)(2)(A)(i); *see also* 29 C.F.R. § 1982.104. If the employer does so, no relief may be awarded to the complainant. 42 U.S.C. § 42121(b)(2)(B)(iv). "Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'" *Williams*, ARB 09-092, PDF at 5 (*quoting Brune v. Horizon Air Indus.*, ARB No. 04-037, ALJ No. 2002-AIR-00008, slip op. at 14 (ARB Jan. 31, 2006).

The Respondent acknowledges, and the evidence establishes, that the Complainant engaged in protected activity, specifically, filing numerous safety reports from June 29, 2010 to February 8, 2011 and filing a report of injury on August 3, 2010 pursuant to 49 U.S.C. §§ 20109(a)(1) and 20109(b)(1)(A).[13] The Respondent also concedes, and the evidence establishes, that there was adverse action taken by the Respondent in this matter, namely the Complainant's removal from service on February 11, 2011 and his ultimate dismissal on February 29, 2012. Thus my analysis will focus on the remaining element of the Complainant's case in chief—whether or not the Complainant's protected activity was a contributing factor in the adverse action.

B. Contributing Factor

In establishing the contributing factor element, a complainant need not "prove that his protected activity was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action" but only that his protected activity "tends to affect in any way the outcome of the [employer's] decision." *Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-00033, PDF at 13 (ARB Sept. 30, 2011) (internal quotations and citations omitted); *see also Marano v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993). A complainant can connect his protected activity to the adverse action directly or indirectly through circumstantial evidence. *Williams*, ARB No. 09-092, PDF at 6; *DeFrancesco*, ARB No. 10-114, PDF at 6-7.

[13] The Respondent disputes that the Complainant's hotline complaint and his participation in the FELA case also constitute protected activity. Resp. Br. 30 n.23. The Complainant did not mention these additional instances of alleged protected activity in his post-trial brief, suggesting that he has waived his argument that they constituted protected activity. However, it is unnecessary to determine whether these additional actions were protected under the FRSA as I find that the undisputed protected activity of filing safety reports was a contributing factor in the adverse action taken against the Complainant for the reasons set forth *infra*.

Direct evidence "conclusively links the protected activity and the adverse action and does not rely upon inference." *Williams*, ARB No. 09-092, PDF at 6 (*citing Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-00028, PDF at 4-5 (ARB Jan. 30, 2008)); *DeFrancesco*, ARB No. 10-114, PDF at 6 (holding employer's suspension of employee who reported job-related injury "violated the direct language of the FRSA"). A complainant may also rely upon circumstantial evidence, which:

> may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward a complainant after he or she engages in protected activity.

DeFrancesco, ARB No. 10-114, PDF at 7; *see also Bechtel*, ARB No. 09-052, PDF at 13 n.69; *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-00003, PDF at 13 (ARB June 24, 2011). Circumstantial evidence must be weighed "as a whole to properly gauge the context of the adverse action in question." *Bobreski*, ARB No. 09-057, PDF at 13-14. This is because "a number of observations each of which supports a proposition only weakly can, when taken as a whole, provide strong support if all point in the same direction." *Bechtel*, ARB No. 09-057, PDF at 13 (*quoting Sylvester v. SOS Children's Vills. Ill., Inc.*, 453 F.3d 900, 903 (7th Cir. 2006)). As there is no direct evidence in the record establishing that the Complainant's protected activity was a contributing factor in his dismissal, my analysis will focus on the circumstantial evidence presented by the parties.

1. Respondent's Knowledge of Protected Activity

As a preliminary matter, the Complainant must show that the Respondent had knowledge of his protected activity in order to succeed in his claim, as the protected activity cannot be a contributing factor if the Respondent was not aware of such activity. Generally, it is not enough for a complainant to show that his employer, as an entity, was aware of his protected activity. Rather, the complainant must establish that the decision makers who subjected him to the alleged adverse actions were aware of his protected activity. *See Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-00038 (ARB Jan. 31, 2006); *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-00003 (ARB Jan. 30, 2004).

The Respondent argues that the Complainant cannot meet his burden of proof in this case because the final decision maker, Mr. Price, who terminated the Complainant's employment, was not aware of his protected activity. Resp. Br. 41. I find it difficult to accept Mr. Price's testimony that he had no knowledge of the Complainant or of his prior protected activity at the time he reviewed the grievance process transcript and made the decision to terminate the Complainant. First, the hearing transcript from the grievance process under the CBA referenced the fact that Mr. McIntyre, after informing the Complainant that he was taken out of service, returned to the Complainant safety reports that he had filed. *See* RX 8 at 284-85, 302-03. Thus, Mr. Price, having read the transcript, was aware of the fact that the Complainant had filed safety reports. Furthermore, Mr. Price's testimony that he did not have any information regarding the Complainant prior to reading the transcript strains credibility in light of the fact that he worked

closely with Mr. McIntyre, his direct supervisor, and even shared an office with him for the year prior to his decision. TR 603.

Even if I were to credit Mr. Price's testimony that he had no knowledge of the Complainant's protected activity, I find that Mr. McIntyre did have such knowledge and his decision to charge the Complainant as well as his substantial input in the decision to suspend and terminate the Complainant is sufficient to meet the knowledge requirement. Case law states that either an employee with authority to take the adverse action, *or* an employee "with substantial input" in that decision, must have known of the protected activity. *See Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-00031 (ARB Sept. 30, 2003); *Gary v. Chautaqua Airlines*, 2003-AIR-00038, PDF at 21 (ALJ May 27, 2004); *Thompson v. Tenn. Valley Auth.*, 1989-ERA-00014 (ALJ Oct. 19, 1990); *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1378 (N.D. Ga. 2004) ("To permit an employer to simply bring in a manager to be the 'sole decisionmaker' for the purpose of terminating a complainant would eviscerate the protection afforded to employees."); *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1193 (2011) ("[A] supervisor's biased report may remain a causal factor if the [decision-maker's] independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified.").

Mr. McIntyre was the individual in charge of enforcing the policy against workplace threats and who decided to take the Complainant out of service, charge the Complainant, and conduct an investigation. Mr. Price acknowledged that had Mr. McIntyre decided not to charge the Complainant, there would have been no investigation and he would have never made the decision to terminate the Complainant. TR 614. Mr. McIntyre participated in the investigative hearing, testifying that the Complainant threatened Mr. Conley. RX 8. Mr. McIntyre was the one who handed the hearing transcript to Mr. Price, and Mr. Price reported directly to Mr. McIntyre. TR 598, 603. Furthermore, it appears based on the record that Mr. Price simply ratified the charges already put into motion by Mr. McIntyre. Mr. Price did not look at any of the hearing exhibits and testified that he was not even aware that there were exhibits despite numerous references to the exhibits in the grievance proceeding transcript. TR 605, 614-15. Mr. Price testified that he based his decision on the simple fact that the incident occurred and he did not consider anything beyond this, such as how the Complainant's words were perceived by Mr. Conley[14] or the motivations of Mr. McIntyre and Mr. Conley. TR 607. Mr. Price did not seem familiar with some basic facts found in the hearing transcript, such as the fact that Mr. Collop represented the Complainant in the hearing. TR 606. Based on the foregoing, I find that the Complainant has established the knowledge requirement.

2. Temporal Proximity

A common source of circumstantial evidence in retaliation cases is the "temporal proximity between the protected activity and the adverse action." *Warren v. Custom Organic*, ARB No. 10-092, ALJ No. 2009-STA-00030, PDF at 11 (ARB Feb. 29, 2012) (*citing Reiss v. Nucor Corp.*, ARB No. 08-137, ALJ No. 2008-STA-00011 (ARB Nov. 30, 2010)). The closer in time between the protected activity and the adverse action, the stronger the inference created. *Id.*

[14]Mr. Price failed to consider Mr. Conley's perception despite the policy definition of a threat as words or actions that "create[] a *perception* that there may be an intent to physically harm persons or property." JX 7.

Of course, if temporal proximity were the only factor weighing in favor of finding contribution, it would necessarily fail "in the face of compelling evidence to the contrary." *Spelson v. United Express Sys.*, ARB No. 09-063, ALJ No. 2008-STA-00039, PDF at 3 n.3. "[W]here the protected activity and the adverse action are separated by an intervening event that *independently* could have caused the adverse action, there is no longer a logical reason to infer a causal relationship between the activity and the adverse action." *Robinson v. Nw. Airlines, Inc.*, ARB No. 04-041, ALJ No. 2003-AIR-00022, PDF at 9 (ARB Nov. 30, 2005) (emphasis in original) (citations omitted).

The Complainant filed his most recent safety report on February 8, 2011, three days before he was taken out of service. *See* RX 14. This provides some evidence of temporal proximity between the protected activity and the adverse action. However, there was an intervening event between his filing of the February 8, 2011 safety report and the adverse action, namely the altercation involving an alleged threat on February 11, 2011 which independently could have caused the adverse action and undercuts the temporal proximity. Similarly, any inference based on temporal proximity of the Complainant's injury report of August 3, 2010 and the adverse action is undermined by the intervening event on February 11, 2011. On balance, I find that temporal proximity provides little assistance to the Complainant in this matter.

3. Hostility Towards the Complainant's Protected Activity

Another factor to consider is evidence of antagonism or hostility towards the Complainant due to his protected activity. The Complainant argues that the fact that he was counseled in regard to the Dearborn Steel incident on August 3, 2010, the same day that he filed an injury report, shows hostility towards the Complainant's protected activity. However, there is conflicting evidence in the record as to whether or not the Complainant was counseled prior to his filing of an injury report that day. The Complainant testified that he filed his injury report prior to his counseling, whereas Mr. McIntyre testified that he counseled the Complainant first thing in the morning before the Complainant went out to work. TR 169-70, 665, 675. The report of injury itself indicates that the report was not filed until 2:05 pm that day, and the evidence establishes that Mr. McIntyre had decided to counsel the Complainant on the Dearborn Steel issue prior to August 3, 2010. RX 1; TR 526, 529. Thus, I find that the Dearborn Steel counseling provides little probative evidence of hostility in regard to the Complainant's protected activity of filing an injury report.

The Complainant also alleges that he was unfairly badgered and harassed and there was a conspiracy between managers to fire him. These incidents included being counseled regarding the Dearborn Steel incident in August 2010 on the same day he filed an injury report, his union representative, Mr. Collop, cautioning him to remain calm when Mr. McIntyre counseled him regarding Dearborn Steel, and company officials questioning his leaving work early for a doctor's appointment in December 2010. As far as the Dearborn Steel incident, the Complainant testified that Mr. Collop told him that Mr. McIntyre and Mr. Unger were trying to "bait" him into an argument at an informal hearing and have him "escorted of the property by the . . . police." TR 165, 215-16, 240. He reported this to the fraud and ethics hotline at Conrail and Norfolk Southern in December 2010 and complained that Conrail was trying to find an excuse to fire him. TR 164-65; *see* CX F; CX I; CX J. Although the Complainant perceived an effort to get rid

of him, I cannot credit the Complainant's allegation of a conspiracy. Mr. Collop testified that there was no conspiracy and that he simply told the Complainant to keep calm when he met with Mr. McIntyre and Mr. Unger about the Dearborn Steel e-mail. TR 526. Mr. Collop testified that Mr. Unger only said that they may have to call the police if the Complainant lost his temper.[15] TR 526. Mr. Collop refused to write a statement for the Complainant stating that management was plotting to take him out of service and told the Complainant that this is not what happened. TR 532. Mr. Flanley, who followed up with Mr. Collop regarding the Complainant's hotline complaint that management was plotting to fire him, testified that Mr. Collop denied ever telling the Complainant there was a conspiracy. TR 720. Whether the Complainant misunderstood Mr. Collop's statements is of no consequence, as I credit the testimony of Mr. Collop that he never overheard management plotting against the Complainant.[16]

The Complainant additionally argues that the circumstantial evidence supports an inference that Conrail was antagonistic or hostile towards him as a result of his frequent safety complaints. The Complainant testified that two months before his suspension Mr. McIntyre told him to "quit sending in the goddam safety reports." TR 160. He also testified that Mr. McIntyre "flicked" safety reports across his desk at the Complainant after he notified the Complainant that he was taken out of service. TR 194, 272. Mr. McBain concurred that Mr. McIntyre "threw" or "tossed" a couple of safety forms across the desk and said "here, I know you keep these." TR 55. The Complainant also testified that in response to raising a safety concern approximately a month before his suspension, Mr. Conley told the Complainant that he should quit if he did not like his job. TR 163.

I find that these actions by Mr. McIntyre and Mr. Conley demonstrate that management was irritated with the Complainant for his frequent filing of safety reports. Mr. McIntyre believed the Complainant had an overabundance of unsafe condition reports. TR 103. Although Mr. McIntyre denied telling the Complainant to "quit sending goddamn safety reports," he did admit that some version of the exchange occurred. Specifically, Mr. McIntyre testified that he asked the Complainant "why he wouldn't give us a chance to go out and fix the safety defect just by coming to us and asking us, rather than making out paper." TR 105. He testified that very few employees turn in formal safety reports, and that the forms were meant to be filled out only if the safety problem was not fixed following a verbal complaint. TR 629-30, 658. Additionally, Mr. Conley acknowledged that in the context of a discussion relating to a safety concern raised by the Complainant, he asked the Complainant "if you're so upset why are you here?" TR 488. He conceded that although it was not his intent, his words could have the effect of discouraging an employee from bringing further safety complaints and that it was not the most professional question to ask. TR 487-88. Lastly, although it was the regular practice of Mr. McIntyre or trainmasters to return safety complaints to the Complainant with an explanation of how the problem was resolved, the timing and the way Mr. McIntyre returned the reports at the time the Complainant was taken out of service also supports a finding that he was annoyed with the Complainant's formal reporting of safety issues. TR 55, 194, 233, 272. The evidence establishes that, at the very least, Conrail management was irritated by the Complainant's written safety

[15] This is corroborated by Mr. Unger and Mr. McIntyre's accounts of the conversation. TR 87-88, 362.

[16] Mr. Collop's credibility is bolstered by the fact that he was the Complainant's union representative and therefore had no reason to side with management or to contradict the Complainant.

complaints and viewed the Complainant as a nuisance for frequently raising his safety concerns. The Complainant's written reports required managers to formally document every incident, which they admitted they did not want to do. Thus, this evidence supports a finding that the Complainant's written safety reports were a contributing factor in the adverse action taken against the Complainant. *See DeFrancesco*, ARB No. 10-114, PDF at 6 (stating that a complainant is not required to show retaliatory animus and that a "contributing factor" includes "*any* factor" that "tends to affect in *any* way the outcome of the decision") (emphasis added).

4. Threat as Pretext for Suspension and Dismissal

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*, ARB No. 04-037, PDF at 14 (*citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)); *DeFrancesco*, ARB No. 10-114, PDF at 6 n.19. 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. E. Air Cent., Inc.*, ARB No. 07-113, ALJ No. 2006-AIR-00009, PDF at 7-8 (ARB May 21, 2009) (*citing Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147-48 (2000)).

There is substantial evidence before me that the Respondent's stated reason for dismissal is unworthy of credence. The Respondent's policy defines a threat as "words or actions that either creates a perception that there may be an intent to physically harm persons or property, or that actually bring about such harm." JX 7. Thus the relevant inquiry should focus on the victim's perception. TR 682, 747. Based on the circumstances surrounding the exchange between the Complainant and Mr. Conley, it is difficult to find that Mr. Conley reasonably believed he was threatened. Mr. Conley testified that he was about 20 feet away from the Complainant when the Complainant allegedly threatened him and they were at no point closer than 10 feet from each other. TR 421-22. Mr. McBain, a bystander, testified that he did not think the Complainant's words constituted a threat and that the Complainant did not make any physical gestures towards Mr. Conley. TR 47, 51, 67. Mr. Coles testified that he did not think the encounter was serious in nature or a heated confrontation. TR 520-23. Furthermore, 15 Maintenance of Way employees provided a statement that they did not notice anything unusual in the lunchroom on the morning of February 11, 2011.[17]

Mr. Conley testified that he feared for his physical safety at the time of the incident and continued to fear the Complainant after he left the lunchroom, when they walked upstairs together to Mr. McIntyre's office, throughout both meetings in Mr. McIntyre's office and even after the Complainant was suspended. TR 423, 434, 440-41, 443, 449, 453, 472. Despite his supposed fear for his safety, he did not call the police. Instead, Mr. Conley returned to the

[17] Mr. Flanley testified that he did not believe the statements made by the Maintenance of Way employees because groups of unionized employees "write statements like that" all the time. TR 733. This bare assertion, without more, is insufficient to discredit the statements made by the employees in the lunchroom that morning, and I attribute no weight to Mr. Flanley's opinion.

lunchroom immediately after the alleged threat to tell the Complainant to accompany him upstairs to Mr. McIntyre's office, and he walked up the stairs first, with his back to the Complainant. TR 192, 440-41. He remained in Mr. McIntyre's office during the second meeting when the Complainant was informed that he was being taken out of service and Mr. Conley returned downstairs with the Complainant to take his radio and switch key. TR 196, 453. He was not accompanied by security guards or police while he walked with the Complainant at any point. These actions are not consistent with an alleged fear for his physical safety.[18]

The fact that Mr. Conley instigated the confrontation on February 11, 2011 with the Complainant further diminishes Mr. Conley's credibility regarding his alleged fear of the Complainant. When the Complainant did not respond to his "good morning" Mr. Conley added "or not" as the Complainant was already walking away. TR 49, 184. After the Complainant told Mr. Conley not to talk to him unless it was work-related, Mr. Conley pressed on saying he could talk to whomever he wanted. TR 185. He could have told the Complainant that he needed to talk to him about a work matter, but did not do so. TR 495. Both Mr. Conley and the Complainant's voices were raised. TR 50. The Respondent argues that Mr. Conley's fear was reasonable because of the Complainant's physical size and known temper issues. Resp. Br. 31. However, Mr. Conley was aware of the Complainant's physical size and short fuse prior to the incident, yet he still instigated the confrontation. Mr. Conley acknowledged that other managers would leave the Complainant alone when he told them not to speak with him about non-work-related matters and there would be no problem. TR 410. Yet Mr. Conley chose to escalate the exchange, telling the Complainant he could talk to him whenever he wished. TR 410.

Further, I find that Mr. Conley's description of the incident lacks credibility and that Mr. Conley attempted to exaggerate the events that occurred.[19] First, Mr. Conley testified that the Complainant said "do you want to tangle with me?" twice, whereas the Complainant, Mr. Coles,

[18] Mr. McIntyre's actions in response to Mr. Conley's allegation of a threat are also inconsistent with a perception of a real threat. Mr. McIntyre testified that although Mr. Conley was "extremely upset" on the telephone, he instructed Mr. Conley to bring the Complainant to his office immediately after the alleged threat, without back-up. TR 122-23. His explanation for this was that it was part of Mr. Conley's job as a manager to deal with the situation, even if it was a safety concern for Mr. Conley. TR 124. I find this explanation incredible as no manager or company policy would require a supervisor, or any employee who had been the subject of a threat, to be placed in a situation presenting a potential physical danger to the employee. Further, Mr. McIntyre, despite believing Mr. Conley's allegations, sent the Complainant back downstairs without supervision to await a decision and did not have anyone escort the Complainant off the property. Thus, both Mr. McIntyre's and Mr. Conley's actions contradict their assertions that they reasonably perceived an actual threat by the Complainant.

[19] I do not find the Complainant's description of the incident to be entirely accurate either. I do not credit the Complainant's testimony that all of his interactions the morning of the incident with Mr. Conley were done "politely." There is little that is polite about refusing to respond to a simple verbal greeting. In addition, telling supervisors not to talk to you unless it involves work, in other words refusing to engage in common reasonably expected greetings or communications in the workplace, undoubtedly contributed to the exchange in the lunchroom on the morning of February 11, 2011. TR 183-86, 190. Nevertheless, the Railroad had accepted the Complainant's occasional refusal to speak about topics other than work. I also find that the Complainant's courteous demeanor at trial is not always the model he presented in the workplace, in light of consistent testimony from his supervisors and co-workers that he was quickly annoyed at times and was not always easy to get along with. However, the focus here is on Mr. Conley's perception of the events that occurred, and based on the totality of the record, I do not find his perceived threat to be reasonable or credible.

and Mr. McBain all testified that he only said it once. TR 419-21. Second, Mr. Unger credibly testified that Mr. Conley had told him that he and the Complainant "got fairly close" and were "nose-to-nose," whereas at trial, Mr. Conley admitted that the Complainant was 10 - 20 feet away from him. TR 421-22, 316. Mr. Unger also testified that Mr. Conley told him that he had informed the Complainant that he needed to talk to him about a safety complaint, whereas at trial Mr. Conley admitted that he never told the Complainant why he needed to talk to him. TR 316, 495.[20] Lastly, Mr. Conley testified that he thought the Complainant was going to come at him and beat him up if he did not leave the lunchroom, but he also admitted that the Complainant did not walk toward him, but instead walked toward the exit doors on his left. TR 425-26.

The Railroad has a legitimate concern for violence in the workplace. However, the evidence in this case establishes that profane language and heated conversations among employees and between employees and supervisors were tolerated as part and parcel of the nature of the work environment and a common occurrence at the Railroad. Mr. McBain testified that there are often raised voices between union employees and managers and that the encounter on February 11, 2011 was "not as bad as some of the things I have seen." TR 63. He testified that he himself backed a trainmaster into another room while yelling at him and did not receive any disciplinary action as a result. TR 64. Mr. Unger and Mr. Conley testified that they have had disagreements and heated conversations in the past with the Complainant and with other employees. TR 322-23, 332. Mr. Conley referenced an incident where an employee yelled at a yardmaster and broke his lanyard, and testified that the employee was not dismissed from employment. TR 322-23, 332, 443-44. Mr. Coles testified that he observed heated confrontations in the past and employees yelling at managers and he did not remember in any of those situations the employee being sent home and later terminated. TR 520.

For the reasons discussed above, I find that the Respondent's stated explanation for its adverse action against the Complainant is not worthy of credence. There is an abundance of evidence that contradicts Conrail's contention that management perceived the Complainant's words to be a threat. It is more likely that management had had enough of the Complainant's frequent safety reports, his instances of impatience and annoyance shown at the workplace, and his refusal to talk to supervisors unless the topic was work-related. Thus, I find that Conrail used the February 11, 2011 incident as an excuse to terminate the Complainant for many reasons, including his protected activity.

Considering the totality of the circumstances under which the Complainant was charged and disciplined, I find that the Complainant has proven by a preponderance of the evidence that his protected activity, specifically his filing of numerous safety reports, contributed to his suspension and ultimate dismissal.

[20] I find Mr. Unger to be a credible witness. He is an ex-marine whose main concern was the fair enforcement of company policies, without regard to whether it was management or employees not following the rules. He was a disinterested witness and favored neither the Complainant nor the Respondent in his testimony. Having been terminated by the Respondent, he could have attacked the Respondent at trial, but did not do so.

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

Once the Complainant has shown that his protected activity was a contributing factor to the adverse employment action, the Respondent is liable unless it can prove by clear and convincing evidence that it would have taken the same action absent the protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv); *Patino v. Birken Mfg. Co.*, ARB No. 06-125, ALJ No. 2005-AIR-00023 (ARB July 7, 2008); *see also* § 20109(d)(2)(a)(i). The clear and convincing standard is a higher burden than a preponderance of the evidence and the Respondent must conclusively demonstrate "that the thing to be proved is highly probable or reasonably certain." *DeFrancesco*, ARB No. 10-114, PDF at 8 (*citing Clarke v. Navajo Express, Inc.*, ARB No. 09-114, ALJ No. 2009-STA-00018, slip op. at 4 (ARB June 29, 2011); *Williams*, ARB 09-092, slip op. at 5. The Respondent argues that it would have taken the same adverse action against the Complainant absent his protected activity because: (1) it followed its policy against workplace threats, which states that violations will be punished through disciplinary action up to and including discharge; (2) the decision to discharge the Complainant occurred after a full investigation and hearing; and (3) the ultimate decision maker, Mr. Price, had no knowledge of the protected activity and decided to discharge the Complainant based solely on the alleged threat. Resp. Br. 50-53.

For the reasons set forth in the previous section, I am not persuaded by the Respondent's contention that it would have taken the same action absent the Complainant's protected activity because Mr. Price had no knowledge of such activity when he made his decision to terminate the Complainant. I find that it was the actions of Mr. McIntyre and Mr. Conley, who were aware of the Complainant's safety reports, that ultimately led to the Complainant's dismissal and that Mr. Price simply ratified Mr. McIntyre's charges against the Complainant. Although Mr. Price's decision occurred following an investigation and hearing, this is insufficient to sever the influence by Mr. McIntyre because Mr. McIntyre participated in the investigation and testified against the Complainant at the hearing. Thus it cannot be said that there was a truly independent investigation apart from Mr. McIntyre's influence. Furthermore, Mr. Price testified that he did not consider any possible improper motives when rendering his decision, nor did he consider how Mr. Conley perceived the Complainant's words, which is required when determining whether a threat occurred under the policy.

The Respondent argues that it simply enforced its policy against workplace violence, but as established above, there is substantial evidence to the contrary. The Respondent presented no evidence of past instances where an employee was discharged due to a violation of the policy prohibiting threats. The Respondent points to Mr. McIntyre's and Mr. McBain's testimony that they never heard of an employee threatening a supervisor. TR 67, 620-21. However, Mr. McBain also testified that he did not believe the Complainant threatened Mr. Conley. Additionally, the policy is the same no matter who is threatened, and even if there were no past instances where an employee threatened a supervisor, the Employer failed to provide any evidence of disciplinary action taken as a result of a threat by an employee against another employee, supervisor or not. Moreover, the Respondent provided no evidence or explanation of why Mr. Price decided to impose the most severe level of discipline available, dismissal, under the company policy, nor

did it provide evidence of objective criteria used by the company for determining the level of discipline to impose for violations of the policy against workplace violence.[21]

The evidence shows that there were past instances of threats where the Respondent did not take disciplinary action as a result. The Respondent argues although there are often heated confrontations at the Railroad, "there is a qualitative difference between [] arguments, which are tolerated, and threats and intimidation, which are expressly prohibited." Resp. Br. 14 n.10. However, there is evidence of threats, as opposed to mere confrontations, which were not disciplined. For example, the Complainant reported in 2001 that a co-worker, Mr. Hardy threatened him and Mr. Hardy was not discharged as a result. TR 546. The Respondent attempts to discount this incident by stating that Mr. Vaccaro, a management employee, did not interpret Mr. Hardy's words " I can't wait to get you" to be a threat. However, under the Respondent's policy it only matters how the Complainant perceived Mr. Hardy's words, not how Mr. Vaccaro perceived it.[22] Mr. McIntyre testified that both Mike Unger and Mr. Hensen, co-workers of the Complainant, had reported in the past that the Complainant had threatened them, but he did not pursue an investigation. TR 90, 96.[23]

Based on the foregoing, I find that the Respondent has failed to establish by clear and convincing evidence that it would have taken the same action absent the Complainant's protected activity. Therefore, the Complainant is entitled to relief under the FRSA.

VI. REMEDIES

A successful complainant is entitled to be made whole under the FRSA. 49 U.S.C. § 20109(e)(1). The FRSA further provides for "compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees." § 20109(e)(2)(C). Though not explicitly stated in the FRSA, the Board has found that damages for emotional distress are available under language identical to § 20109(e)(2)(C). *See Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-00047, PDF at 7-8 (ARB Aug. 21, 2011) (interpreting 49 U.S.C. § 31105(b)(3)(A)(iii)); *see also Mercier v. Union Pac. R.R. Co.*, ARB Nos. 09-101, -121, ALJ Nos. 2008-FRS-00003, 4, PDF at 8 (ARB Sept. 29, 2011) (noting complainant may seek damages for mental hardship under the Act). Punitive damages up to $250,000 are also authorized. § 20109(e)(3).

[21] Mr. McBain testified to a physical altercation between two co-workers that resulted in only a ten-day suspension. TR 66. In comparison, the Complainant, who never came close to actually making physical contact with Mr. Conley, was terminated.

[22] Mr. Vaccaro was not a credible witness. He is in a management position with the railroad charged with enforcing company policies, including the policy regarding threats in the workplace. Mr. Vaccaro claims that he viewed the Complainant as "life-threatening" to him, and yet he never took *any* action in response to Complainant's alleged "life threatening" conduct in all the years he worked with Complainant.

[23] Mr. McIntyre testified that he did not pursue an investigation because Mr. Unger and Mr. Hensen did not want to testify to the incident. TR 92, 144-45. However, he could have asked for witness statements by other workers, like he did in this case, or counseled the Complainant, but chose not to, despite the "zero tolerance" policy.

To make the Complainant whole, he is entitled to have his disciplinary record expunged of any reference to the charges stemming from the February 11, 2011 incident, including his suspension and termination. The Complainant is further entitled to be reinstated with the same seniority status that he would have had but for the discrimination. 49 U.S.C. § 20109(e)(2)(A).

The Complainant is also entitled to back pay with interest under the FRSA. 49 U.S.C. § 20109(e)(2)(B). The Complainant testified that he has not been paid since he was taken out of work on February 11, 2011, and he submitted W-2 Forms which show earnings of $49,712.64 in 2009 and $47,397.06 in 2010. TR 213; CX AAA. The Complainant asserts that he would have earned slightly more in 2011 and 2012 than he did in 2010 and suggests that I use only his earnings in 2009 to determine his average weekly wage. Compl. Br. 15. However, the Complainant offered no proof that his salary would have increased after 2010, or by how much. The Complainant also did not explain why he earned more in 2009 than in 2010. Thus I find it appropriate to average these two years' salaries and divide that amount by 52 weeks, which results in an average weekly wage of $933.75. The Complainant is therefore entitled to back wages from February 11, 2011 up until the date he is reinstated in the amount of $933.75 per week.[24] Prejudgment interest is to be paid for the period following the Complainant's suspension on February 11, 2011, until the date of this Decision and Order. Post-judgment interest is to be paid thereafter, until the date of payment of back pay is made.

The Complainant seeks a restoration of all contributions the Respondent would have made to the Railroad Retirement Board on his behalf and a restoration of all service months he would have earned towards retirement. I find that the Complainant is entitled to a restoration of all service months he would have earned in order to make him whole, but he is not entitled to the contributions the Respondent would have made to his retirement because the record contains no evidence establishing how the Respondent's contributions are calculated. The Complainant failed to prove how much he should be reimbursed for losses to his retirement plan. *See Douglas v. Skywest Airlines, Inc*., ARB Nos. 08-070,-074, ALJ No. 2006-AIR-00014, PDF at 21 (ARB Sept. 30, 2009).

The Complainant seeks compensatory damages for his pain and suffering. A complainant must prove compensatory damages by a preponderance of the evidence. *Ferguson*, ARB No. 10-075, PDF at 7. An award is "warranted only when a sufficient causal connection exists between the statutory violation and the alleged injury." *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 938 (5th Cir. 1996). A complainant's credible testimony alone is sufficient to establish

[24] The Respondent argues that the Complainant is not entitled to an award of back pay because he could have obtained other work but made no effort to do so. Although the Complainant has a duty to mitigate damages, the Respondent provided no evidence that comparable jobs were available, and thus failed to meet its burden of establishing that the Complainant failed to mitigate damages related to wages. *See Douglas v. Skywest Airlines, Inc*., ARB Nos. 08-070, -074, ALJ No. 2006-AIR-00014, PDF at 20 (ARB Sept. 30, 2009) ("While a complainant must show reasonable diligence in attempting to mitigate damages, the employer bears the burden of proving that the employee failed to mitigate . . . . by establishing that comparable jobs were available and that the employee failed to make reasonable efforts to find substantially equivalent and otherwise suitable employment.").

emotional distress. *Id.* at 7-8; *see also Simon v. Sancken Trucking Co.*, ARB Nos. 06-039, -088, ALJ No. 2005-STA-00040 (ARB Nov. 30, 2007). The Complainant testified that he has dealt with depression and self-worth issues since being taken out of service and experiences stress about how to support his family with the loss of income. TR 203-04. I find the Complainant's testimony persuasive and supported by the opinions of his psychiatrist, Dr. Patel. However, I also find that the Complainant was suffering from emotional issues such as stress and anger prior to the adverse action taken by the Respondent. The Complainant "must show by a preponderance of the evidence that the *unfavorable personnel action* caused the harm." *Luder v. Cont'l Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-00009 (ARB Jan. 31, 2012) (emphasis added) (internal quotation marks and citations omitted). Here, the Complainant was suffering from emotional distress prior to the adverse action taken by Conrail. He began seeing Mr. Pollack a month before he was suspended from service. Although the Complainant alleges that his stress and anxiety prior to his suspension were due to a conspiracy by managers to fire him, I have found that the evidence of an alleged conspiracy and the Complainant's testimony regarding the alleged conspiracy is weak. Thus, the emotional distress experienced by the Complainant is not entirely due to the Respondent's adverse action, and any award of compensatory damages for pain and suffering must account for this fact. A brief survey of other whistleblower cases shows that awards for emotional distress tend to range from $4,000 to $10,000, though a couple outliers have awarded compensatory damages including emotional distress of upwards of $75,000.[25] I find that $4,000 is an appropriate award for the Complainant's pain and suffering resulting from his suspension and dismissal.

The Complainant additionally seeks, and is entitled to, compensatory damages to recoup the amount of money he spent replacing his loss of employee health insurance, in the amount of $200 per month from the time he was taken out of employment until the time he is reinstated.[26] TR 215; *see Tipton v. Ind. Mich. Power Co.*, ARB No. 04-147, ALJ No. 2002-ERA-00030, PDF at 10 (ARB Sept. 29, 2006) (stating that a Complainant may recover the cost of purchasing substitute coverage). The Complainant also seeks compensatory damages for the co-pay costs he incurred for treatment with Mr. Pollack in the amount of $324.00 and with Dr. Patel in the amount of $180.00. Compl. Br. 15. The Complainant testified that he saw Dr. Patel 7 times and paid a co-pay of $15 per visit, thus I find that he is entitled to the requested $180.00 for his psychological treatment with Dr. Patel. TR 214. The Complainant testified that he visited Mr. Pollack 27 times from January 2011 to September 2011 with a co-pay of $15 per visit, which

[25] *Ferguson*, ARB No. 10-075, PDF at 7-8 (awarding $50,000 in discharge case plus punitive damages); *Carter v. Marten Transport, Ltd.*, ARB Nos. 06-101,-159, ALJ No. 2005-STA-00063, PDF at 15-16 (ARB June 30, 2008) (awarding $10,000 in discharge case); *Hobson v. Combined Transport, Inc.*, ARB Nos. 06-016, -053, ALJ No. 2005-STA-00035, PDF at 7-8 (ARB Jan. 31, 2008) (awarding $5,000 in discharge case); *Jackson v. Butler & Co.*, ARB Nos. 03-116,-144, ALJ No. 2003-STA-00026, PDF at 9 (ARB Aug. 31, 2004) (awarding $4,000 in discharge case); *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071,-095, ALJ No. 2002-STA-00035, PDF at 17 (ARB Aug. 6, 2004) (awarding $10,000 in discharge case); *Michaud v. BSP Transport, Inc.*, ARB No. 97-113, ALJ No. 95-STA-00029, HTML at 7-8 (ARB Oct. 9, 1997) (affirming $75,000 of compensatory damages including emotional distress supported by medical evidence in discharge case); *Anderson v. Amtrak*, 2009-FRS-003, PDF at 25 (ALJ Aug. 26, 2010) (awarding $60,000 in discharge case and assessing $100,000 in punitive damages); *Calhoun v. United Parcel Service*, 2002-STA-00031, HTML at 39-40 (ALJ June 2, 2004) (awarding $2,000 where ALJ found employer's retaliatory actions were not particularly egregious, nor the emotional damage as extensive as other cases); s*ee also Burlington N. v. White*, 548 U.S. 53, 58-59, 72 (2006).

[26] This amount is based on the Complainant's testimony alone, but since the Respondent has provided no contrary evidence nor did it dispute this amount, I find that $200 per month is appropriate.

would total $405.00. TR 201, 214, 258. Because the Complainant is not entitled to reimbursement for his visits prior to Conrail's adverse action, I find that the Complainant's request of $324.00 for visits to Mr. Pollack's office to be reasonable.

The Complainant seeks punitive damages as permitted by the FRSA. Punitive damages are to punish unlawful conduct and to deter its repetition. *BMW v. Gore*, 517 U.S. 559, 568 (1996). Relevant factors when determining whether to assess punitive damages and in what amount include: (1) the degree of the defendant's reprehensibility or culpability; (2) the relationship between the penalty and the harm to the victim caused by the respondent's actions; and (3) the sanctions imposed in other cases for comparable misconduct. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 523 U.S. 424, 434-35 (2001). Punitive damages are appropriate for cases involving "reckless or callous disregard for the [complainant's] rights, as well as intentional violations of federal law . . . ." *Smith v. Wade*, 461 U.S. 30, 51 (1983), *quoted in Ferguson*, ARB No. 10-075, PDF at 8-9. The Administrative Review Board further requires that an ALJ weigh whether punitive damages are required to deter further violations of the statute and consider whether the illegal behavior reflected corporate policy. *Ferguson*, ARB No. 10-075, PDF at 8. Although the Respondent's actions were sufficient to prove the Complainant's claim, under the circumstances of the present case I do not find the harm to the Complainant so severe, or the Respondent's actions so reprehensible or culpable as to warrant punitive damages.

The Complainant's counsel is entitled to submit a petition for attorney fees and costs for his work before the Office of Administrative Law Judges within 20 days of receipt of this Decision and Order. Respondent's counsel has 20 days from receipt of the fee petition to file a response.

ORDER

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

1. The Respondent shall expunge the Complainant's personnel file of any disciplinary record or negative references related to the charges and discipline arising from the February 11, 2011 incident;

2. The Respondent shall reinstate the Complainant with the same seniority status that he would have had but for the discrimination, and the Respondent shall restore all service months for retirement purposes that he would have accrued but for the discrimination. *See* 49 U.S.C. § 20109(e)(1),(2)(A);

3. The Respondent shall pay the Complainant back wages with interest from February 11, 2011 until the date of his reinstatement in the amount of $933.75 per week. 49 U.S.C. § 20109(e)(2)(B). Prejudgment interest is to be paid for the period following Complainant's suspension on February 11, 2011, until the date of this Decision and Order. Post-judgment interest is to be paid thereafter, until payment of back pay is made;

4. The Respondent shall pay the following compensatory damages to the Complainant: (1) reimbursement of cost of purchasing substitute health insurance in the amount of $200 per month from February 11, 2011 until the date of his reinstatement; (2) reimbursement of costs incurred for treatment with Mr. Pollack in the amount of $324.00 and Dr. Patel in the amount of $180.00; and (3) compensation in the amount of $4,000 for his pain and suffering as the result of his suspension without pay and ultimate dismissal; and

5. Respondent shall pay the Complainant's reasonable attorney's fees and costs. The Complainant shall file a fee application within **20 days** of the date on which this order is issued. Should the Respondent object to any fees or costs requested in the application, the parties' attorneys shall discuss and attempt to informally resolve the objections. Any agreement reached between the parties as a result of these discussions shall be filed with the court in the form of a stipulation. In the event that the parties are unable to resolve all issues relating to the requested fees and costs, the Respondent's objections shall be filed not later than **20 days** following service of the Complainant's fee application. **Any objections must be accompanied by a certification that the objecting party made a good faith effort to resolve the issues with the Complainant's attorney prior to the filing of the objections.**

SO ORDERED.

Digitally signed by Colleen Geraghty
DN: CN=Colleen Geraghty, OU=Administrative Law Judge, O=Office of Administrative Law Judges, L=Boston, S=MA, C=US
Location: Boston MA

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts

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

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

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

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

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

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

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