U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 19 October 2012

CASE NO.: 2012-FRS-9

IN THE MATTER OF:

SEAN BOWIE

Complainant

v.

NEW ORLEANS PUBLIC BELT RAILROAD

Respondent

APPEARANCES:

ROSS CITTI, ESQ.
SARAH YOUNGDAHL, ESQ.

For The Complainant

PATRICK A. TALLEY, ESQ.
RENEE G. CULOTTA, ESQ.

For The Respondent

Before: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER

This matter arises under the employee protection provisions of the Federal Railroad Safety Act ("the Act") 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. Law No. 110-53. The employee protection provisions of the Act are designed to safeguard railroad employees who engage in certain protected activities related to railroad safety from retaliatory discipline or discrimination by their employer.

A formal hearing in this matter was conducted on July 10 and July 11, 2012, in Covington, Louisiana. Each party was represented by counsel, presented documentary evidence, examined and cross-examined the witnesses, and made oral and written arguments. The following exhibits were received into evidence[1]: Administrative Law Judge's Exhibits 1-6; Complainant's Exhibits 1-23, 25-29, 31-33, 35-36, and 41; and Respondent's Exhibits 1-34, 36, 38-43, 45, 46-47[2], 48-49, and 51. Following the hearing, both parties filed briefs.

The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes, and case law. They are also based on my observation of the demeanor of the witnesses who testified at the hearing. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been reviewed and considered.

PREFACE

On September 4, 2010, while in the employment of Respondent, Complainant and two other employees, Gary Naquin and Ellis Case, were assigned the task of switching rail cars from one track to another. In the process, Complainant was injured and subsequently was terminated. The issue for determination is whether Complainant was terminated, at least in part, in violation of the Act.

UNDISPUTED FACTS

The parties agree to the following:

1. This matter arises under the employee protection provisions of the Federal Railroad Safety Act ("the Act"), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007. Pub. Law No. 110-53.

2. Complainant was employed by Respondent within the meaning of the Act.

3. Respondent is a railroad carrier within the meaning of the Act.

4. Complainant engaged in protected activity within the meaning of the Act on September 4, 2010, when he reported his work-related personal injury to Respondent.

5. On September 4, 2010, Complainant alleged he sustained an on-the-job injury while engaged in a switching movement at the NOPB Cotton Warehouse yard.

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[1] References to the transcript and exhibits are as follows: Trial Transcript: Tr. ___; Administrative Law Judge's Exhibit: ALJX-___; Complainant's Exhibit: CX-___; and Respondent's Exhibit: EX-___.

[2] These exhibits are admitted for the limited purpose of impeachment. (Tr. 20; Tr. 465-471).

6. Complainant suffered an adverse personnel action on April 14, 2011, when he was notified of Respondent's decision to terminate his employment.

7. On May 3, 2011, Complainant timely filed a complaint with OSHA alleging he was terminated in retaliation for reporting his work-related personal injury.

8. On November 18, 2011, OSHA dismissed Complainant's complaint.

9. Complainant timely appealed from OSHA's dismissal by filing an appeal with the OALJ on December 16, 2011, and filing a complaint detailing paragraph by paragraph his claims dated January 30, 2012.

ISSUES FOR DETERMINATION

The following issues remain to be determined:

1. Whether Complainant has proven by a preponderance of the evidence that his protected activities caused Respondent to retaliate against him in violation of the Act;

2. Whether Respondent established by clear and convincing evidence that the same adverse action would have been taken absent Complainant's protected activities; and

3. Whether Complainant is entitled to any damages, including punitive damages.

SUMMARY OF RELEVANT EVIDENCE

I. Complainant

Complainant is 42 years old and began working for Respondent in 2005 as a switchman, a position that he held until his injury on September 4, 2010. That day, he had a job briefing with the acting foreman Ellis Case regarding the task of switching cars out of Track 18. Complainant relayed the instructions to the engineer on the locomotive. First, they needed to couple up two cars that were already on Track 18. After that, Complainant got back on the locomotive and told the engineer by radio to "kick" the coupled cars. The engineer complied; Complainant pulled a lever and told the engineer "that would do it."[3] (Tr. 50). Complainant testified that the engineer then had control of the movement of the rolling cars, which he followed down the track.

The engineer always operates the locomotive, but the control of its movement passes between the engineer and the switchman depending on what the engineer can see. When the engineer is operating light engine without any cars coupled to the locomotive and short nose forward, as pictured in CX-20, the engineer controls the movement of the locomotive and can "see everything in front" of him, according to Complainant. (Tr. 52-54).

[3] The "that will do" command means for the engineer to stop. (Tr. 292).

Complainant was trained by and works by the General Code of Operating Rules (GCOR). (CX-41). Rule 1.47(B)(1) states that the "engineer is responsible for safely and efficiently operating the engine." (CX-28, p. 1). Rule 1.47(C)(1) states that "all crew members must act responsibly to prevent accidents or rule violations…If proper action is not being taken, crewmembers must remind engineer of such condition and required action." Rule 6.28 states "trains or engines must move at a speed that allows them to stop within half the range of vision short of: train, engine, railroad car, men or equipment fouling the track, stop signal, or derail or switch lined improperly". (CX-41). Complainant maintained that Mr. Naquin did not follow this rule on September 4, 2010. (Tr. 57).

General Superintendent Bulletins are also issued by Respondent to establish other work rules. Bulletin Number 06-10 dated April 8, 2010, states that when required to "couple to a track with standing cars" the employee must make sure "Any employee riding equipment dismounts after the safety stop is made" and "[s]top the movement 25 ft. before coupling to the standing equipment". (CX-16; RX-9). Furthermore, this rule states that "[m]aking these Safety Stops is the responsibility of the switchman controlling the movement and the engineer operating the locomotive." (CX-16). Mr. Naquin did not follow either of these instructions on September 4, 2010. (Tr. 59). According to Complainant, it would only be his responsibility to instruct the engineer to make the safety stop if they were shoving cars.[4]

At the time of the September 4, 2010 accident, the engineer Gary Naquin was operating the locomotive short nose forward, light engine, and Complainant was riding on the outside of the locomotive. (Tr. 53). He testified he would have gotten off if the engineer would have made a safety stop as required before coupling up to standing cars. At the time of the accident, Complainant was maintaining four point contact, standing with his body facing the locomotive and his eyes facing the rail cars ahead that were rolling to couple up with the standing cars. Complainant was on the left side of the locomotive and Mr. Naquin was inside the locomotive on the right side. Due to the impact of the locomotive with the rolling cars that stopped abruptly, Complainant lost his grip, his body spun around, and his back hit the side of the locomotive. After the collision, Mr. Naquin told Complainant that he "'applied the brakes and the brakes didn't set up'". (Tr. 62). According to Complainant, the locomotive bounced off the standing cars because of the force of the collision. Complainant reported the accident to Mike Majoue, the yard master on duty, and was taken to the hospital where he was treated for his back injury. (Tr. 63).

Rule 12 of Complainant's union's collective bargaining agreement requires written notice of the specific charges alleged and the date and place of the investigation to be given to an employee prior to the investigation and within seven days of the date of the offense.[5] (CX-31, p. 1). The union member is entitled to a "fair and impartial investigation". A charge letter written

[4] When the locomotive is coupled up to cars and is pushing the cars with the short end of the locomotive, this movement is called a "shove". (Tr. 53-54; 85).

[5] Complainant is a member of the United Transportation Union ("UTU"), which has a collective bargaining agreement ("CBA") with Respondent.

by Trainmaster Alvie Mixon dated September 7, 2010, outlines Complainant's alleged rule violations; however, Complainant stated that he never received it.[6] (CX-6; CX-7; CX-8; Tr. 65, 86; RX-25). Complainant did not give his first written statement about the accident until September 14, 2010. (RX-32, pp. 8-9). Mr. Thomas Lobello, the Chief Operating Officer, had asked Complainant in a phone call to send him a written statement of what happened. (Tr. 89).

The formal investigation hearing was held April 4, 2011.[7] David Duplechain, the on-site union representative, represented all three employees (Complainant, Mr. Naquin, and Mr. Case) who received charge letters related to the September 4, 2010 accident. Fred Leif was the presiding hearing officer. He did not meet with Complainant and Mr. Duplechain before or after the formal investigation, nor did he receive any evidence from them prior to the proceedings. Complainant and Mr. Naquin were the only eye witnesses to the accident who testified.

Complainant received a letter from Mr. Lobello dated April 14, 2011, informing him of his termination as a result of the findings of the formal investigation. (CX-18; RX-39). Complainant was found in violation of GCOR Rules 1.1.1[8] and 1.1.2[9] and General Superintendent's Bulletin Notice No. 32. These rules were not originally identified as alleged rule violations in the charge letter. (Tr. 71). Mr. Naquin and Mr. Case were not charged with any violations in connection with the September 4, 2010 accident.

Complainant testified that during his six years working for Respondent he never heard of any management employee who had been disciplined or terminated for a safety violation and has never heard of any other union employee who has been terminated for violating the rules that he was charged with violating. (Tr. 70, 74).

Complainant also alleges that Respondent's management staff has intimidated him in the past to prevent him from reporting his injuries. To support this, a memo written by Tom Lobello, the Chief Operating Officer for Respondent, in November 2007[10] was presented. (CX-33). The memo informed transportation employees of a deduction from their paycheck "due to a lawsuit filed against [Respondent] in October 2007…" (CX-33). Complainant also reviewed two job opening descriptions he had seen posted on bulletin boards at his former office on October 17, 2011, and May 4, 2012. (CX-35; CX-36). Both stated that "The applicant must have no personal injuries or attendance issues."

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[6] On cross-examination, it was noted that at the formal investigation hearing, Complainant stated in three separate instances that he had received the charge letter. (Tr. 86-88; RX-31, pp. 5, 25, 46).

[7] The original date for the investigation was postponed and rescheduled several times "by mutual agreement" of Respondent and the union representative. (RX-26; RX-27; RX-28).

[8] **1.1.1. – Maintaining a Safe Course:** In case of doubt or uncertainty, take the safe course. (CX-9; RX-40, p. 11).

[9] **1.1.2. – Alert and Attentive:** Employees must be careful to prevent injuring themselves or others. They must be alert and attentive when performing their duties and plan their work to avoid injury. (CX-10; RX-40, p. 11).

[10] On cross-examination, Complainant agreed that at his deposition he stated the first time he had seen this memo was at his deposition. (Tr. 80).

On cross-examination, Complainant identified RX-32 as the only written statement he made about the accident. (Tr. 89). In the statement Complainant never indicates that Mr. Naquin failed to make a safety stop. However, he reiterated that he was not controlling the locomotive's movement at the time of the accident. Complainant agreed he did not give the engineer a command to make a safety stop, did not communicate the distance as they approached the stationary cars, and did not give a car count. According to Complainant, making a safety stop is "automatically" done when operating light engine, the engineer could see the cars in front of him, and there was no car count to give; therefore, the commands he did not make were not necessary. Complainant agreed that photos introduced as CX-25 and CX-27 show the view from Mr. Naquin's position in the locomotive at the time of the accident. (Tr. 98-99). He agreed that in these photos, from this position, Mr. Naquin could not see the standing cut of cars, but that is why Mr. Naquin needed to be sure to give himself enough time to stop.

At the formal investigation, Complainant stated that he was initially controlling the movement when he gave the command to kick the cars. (Tr. 104-106; EX-31, p. 27). However, he maintains that after that, he had no more control of the movement.

While Complainant acknowledged that he is entitled to a formal investigation, he testified that in past instances of discipline, Mr. Lobello has told Complainant it was likely that he would be terminated if he went through with the hearing rather than taking, for example, a suspension. (Tr. 117). Complainant had taken responsibility for a prior accident in 2005 and took 10 days suspension waiving rights to a formal investigation. (RX-10; RX-11). Complainant had also received notices of investigations for two separate instances in 2006, but was not charged with a violation in either case. (RX-12; RX-13). Complainant's record also includes a notice of his violation in 2006 of GCOR Rules 1.15 and 1.16 because he did not respond to a call to work. (RX-14). Charge letters were also issued for an incident in 2008 and one in 2010. (RX-15 through RX-19). No one was found at fault in the 2008 incident, and it was determined Complainant injured his hand as a result of improper operation of a hand brake in 2010. (Tr. 124; RX-20). Complainant was allowed to substitute his suspension period with the time he had off for his hand sprain. Complainant filed a lawsuit against Respondent concerning the 2010 hand injury. It was settled, and Complainant returned to work in the same position at the same rate of pay. An investigation notice was issued on August 7, 2010, regarding Complainant's involvement in a derailment three days prior. (RX-21). He waived right to an investigation and accepted responsibility and a 10 day suspension. (RX-23; RX-24).

As a result of his termination, Complainant's family lost medical insurance. (Tr. 72). Complainant feels he can no longer do anything for his family. His wife was employed prior to his injury, but she has since lost her job because she had to take off time to take care of Complainant after his surgery. Complainant has an insurance policy through his union, but he is no longer receiving those benefits. (Tr. 73). Complainant testified that his son is now having problems in school because he is not "able to do things for him." Complainant feels the termination has put stress on his household. (Tr. 73).

On cross-examination, Complainant testified that he received his pay through November 2010. (Tr. 145). Thereafter, he began receiving compensation insurance or railroad sickness benefits from the Railroad Retirement Board in the amount of $660.00 every two weeks, until

January 1, 2012. He also received job insurance benefits from the union from April 14, 2011 through April 14, 2012. (Tr. 147). He also received $12.00 per day from another union policy. Complainant testified that none of these benefits compared to the income he had been making before his September 4, 2010 injury. On a form dated August 4, 2011, Complainant reported to his physician that he was "stress free". (Tr. 148; RX-49, p. 1). On a form dated September 14, 2010, it was indicated Complainant had no anxiety or panic disorders, depression, or any other disorders. (Tr. 149; RX-49, p. 3).

II. Gary Naquin

Mr. Naquin has worked for Respondent for about ten years and is currently an engineer. On September 4, 2010 he was given a job briefing by Ellis Case, the acting foreman, regarding the task of kicking cars onto Track 18. In a kick procedure, cars are coupled to the locomotive, the engine is given power to start the cars rolling, and then the pin lever is released so the cars can continue down the track at their own momentum. In this instance, two cars were coupled to the locomotive; the plan was to kick those cars and follow them down the track, as per the job briefing given by Mr. Case.

On this day, a second kick was needed to give the cars enough momentum. Complainant gave directions to Mr. Naquin to stop the locomotive and kick again. (Tr. 334). Mr. Naquin stated he could not see the standing cars down the line to which the rolling cars were supposed to couple up to and could only see the box car in front of the locomotive. (RX-36, p. 12). According to Mr. Naquin, Complainant's role was to give Mr. Naquin "direction if a car comes", which Complainant had been doing up until he ordered the second kick. (Tr. 337). Mr. Naquin stated that it was necessary for Complainant to be on the locomotive even after the second kick because Complainant was controlling the movement; Mr. Naquin stated he was relying on Complainant to give him direction as he could not see past the box car in front of him.

Mr. Naquin said he did not make a safety stop in this instance before the coupling as he "had no communication as far as direction from [Complainant]…" (Tr. 339). He testified he did not make a safety stop on his own because he had no indication that the cars were about to stop when they did.

At the formal investigation hearing, it was found that Mr. Naquin was not at fault and did not violate Rule 6.28 because he did not know where the standing cars were. Mr. Naquin opined that a hard coupling did not occur because the locomotive was only traveling about two miles per hour in his estimation. Mr. Naquin stated he did not leave the seat of his locomotive to check on Complainant because he had no indication anything was wrong and believed it had been a normal coupling. (Tr. 343; RX-32, p. 7). This is also how he described the coupling to Mr. McCrossen, the Safety Director, on the day of the accident. (RX-30, p. 1; Tr. 346). On September 4, 2010, Mr. Naquin also made a written statement of the accident that day. (RX-32, p. 10; CX-5).

At trial, Mr. Naquin reviewed Mr. Lobello's memo regarding paycheck deductions. (CX-33). He testified that he was not intimidated by this memo and did not believe it was meant to deter reporting of injuries. (Tr. 344-345).

Mr. Naquin agreed that there is no rule relieving the engineer of the responsibility of making a safety stop. He also testified that he had no intention of making a safety stop before he coupled up to the standing cars in the movement on September 4, 2010. (Tr. 349, 352). Mr. Naquin said he could not see when the cars he was following were going to stop. (Tr. 349).

Mr. Naquin stated that a car count is not always necessary when operating a locomotive light engine and "from light engine, I can see what I'm getting ready to couple up to." (Tr. 353). Mr. Naquin confirmed he was operating light engine at the time of the September 4, 2010 accident. He also stated that there is no rule requiring a switchman to give the engineer a car count or call for a safety stop when the engineer is operating light engine. (Tr. 369-370).

III. Ellis Case

Mr. Case is employed by Respondent as a switchman foreman. He was acting as a foreman on September 4, 2010, but he did not witness the coupling event. He had given a job briefing to his crew (including Complainant and Mr. Naquin) before work commenced that day. Complainant was positioned on the locomotive to give direction to the engineer, Mr. Naquin, and in Mr. Case's opinion, Complainant could not have been doing his job from the ground. Mr. Case stated that Complainant had "direction" of the movement at the time of the accident. According to Mr. Case, Complainant still would have to give directions and further communication to the engineer even after the cars were kicked and the "that will do" command was given. (Tr. 364-365). He said Mr. Naquin could not have completed the movement on his own.

Mr. Case reviewed Mr. Lobello's memo regarding paycheck deductions. (CX-33). He understood this to be part of the safety incentive program and did not believe it was motivated to deter employees from reporting accidents. (Tr. 367). Mr. Case could not recall anyone complaining about feeling intimidated from reporting an accident. He has reported a personal injury since seeing the memo and suffered no disciplinary action after that report.

Mr. Case stated he was standing by Switch 18, and he did not hear or see the accident occur. (Tr. 369; CX-4; RX-34). According to Mr. Case, Complainant needed to say something to relinquish charge of the movement to the engineer. (Tr. 373).

IV. John McCrossen

Mr. McCrossen has been employed by Respondent for about 15 years. He previously held the position of general superintendent and currently is the director of safety and manager of claims. He is responsible for finding and eliminating safety hazards and recommending policies and procedures to prevent injuries. Mr. McCrossen believes that safety is the responsibility of all employees and injuries and accidents are preventable if employees work safely.

Mr. McCrossen was involved in the investigation of Complainant's September 4, 2010 accident. (CX-1; RX-29). He visited Complainant in the hospital that day and took statements of Mr. Naquin, Mr. Case, and Mr. Majoue.[11] (CX-2 through CX-5). Mr. McCrossen was not a witness to the accident. A reenactment of the accident was conducted within the month prior to this trial, but not before the formal investigation and termination of Complainant.

Mr. McCrossen did not have input into the decision to terminate Complainant. He does not believe Complainant was terminated for filing a FELA claim or because he hired an attorney. (Tr. 262).

V. <u>Alvie Mixon</u>

Mr. Mixon is a train master with Respondent, and therefore, part of management. He supervises the switchmen and engineers and is in charge of the operations in the switch yard. Mr. Mixon gave a statement of the September 4, 2010 accident. (RX-33; CX-2). He received notice of the accident from Mr. Majoue at 3:05 p.m. that day. Mr. Mixon went to see Complainant immediately after the accident and called an ambulance. (RX-33; CX-2).

Mr. Mixon is pictured in RX-36 standing in the position Complainant was standing at the time of the accident on September 4, 2010. (RX-36, pp. 10-11; Tr. 378). Mr. Mixon testified that from this position he could see the cars rolling ahead of the locomotive and the standing cars. Mr. Mixon stated that in the movement which resulted in Complainant's injury, it was the switchman's responsibility to let the engineer know that the rolling cars are about to hit the standing cut of cars. (Tr. 378). Also, it would be necessary for the switchman to ride the locomotive down the track during that movement to assist the engineer with any complications with the coupling.

Mr. Mixon reviewed Mr. Lobello's memo regarding paycheck deductions. (CX-33). The deduction was not applicable to him because he was a manager. (Tr. 391). He did not feel that the memo was meant to discourage employees from reporting injuries, and he testified he did not hear any discussions at manager meetings regarding how to discourage injury reports. (Tr. 382).

Mr. Mixon was the charging officer and signed off on the charge letter because he was the supervisor on duty during the accident. However, he did not participate at the formal investigation hearing.

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[11] Yardmaster Michael F. Majoue did not testify at trial. In his written statement about Complainant's accident, he stated that he was advised by Mr. Naquin that Complainant had hit his back at about 3:05 p.m. that day. (CX-3). Mr. Majoue saw Complainant "slowly stepping down" from the locomotive when the crew pulled in in front of the Cotton Warehouse Yard office. Mr. Majoue notified Mr. Mixon. Complainant told Mr. Majoue his back was in pain, and Mr. Majoue asked Complainant if he wanted to call an ambulance. When Mr. Mixon arrived, the decision was made to call an ambulance. Mr. Naquin told Mr. Majoue he did not see Complainant injure his back because he was on the opposite side of the locomotive, but Complainant told him he was injured. However, Mr. Naquin told Mr. Majoue that there was not a hard coupling. (CX-3).

VI. George Frederick Leif

Mr. Leif is a self-employed consultant, and he was hired by Respondent to conduct the formal investigation. He has worked in the railroad industry for 41 years. Mr. Leif previously worked for the Ohio Railroad as a trackman, switch operator, brakeman, yard foreman, yard master, train master, general manager of the crew management center, and as a managing director of planning and operations in the automotive business unit. He has mediated or consulted for about 20 to 25 railroads. Mr. Leif also has a background working in labor relations and has participated in numerous formal disciplinary investigations. All of Mr. Leif's work is for railroad management, not the railroad unions or union employees.

Mr. Leif found the charge letter written to Complainant on September 7, 2010 to be in compliance with the railroad industry standard for identifying the specific charge, despite the language "include but not limited to" with regard to the rules cited as allegedly violated. (RX-25; CX-6; CX-7; CX-8). Mr. Leif testified that other rules violated but not cited on the charge letter can be identified during the course of the formal investigation, and he allowed evidence of such rules to be admitted during the investigation in this matter. (Tr. 300).

Mr. Leif met with Mr. McCrossen and Mr. Lobello the day before the formal investigation "to understand the facts and to prepare for the investigation…" (Tr. 271). This was his first occasion working with Respondent and had never met either gentleman. Mr. Leif did not find this meeting swayed his opinion nor did he find it unusual to meet with management prior to the hearing as management officers act as the hearing officer in many cases. (Tr. 272). Mr. Leif testified that at the meeting Mr. Lobello and Mr. McCrossen did not try to influence him nor did they provide any information that was not presented the next day at the formal investigation. Mr. Duplechain did not request to meet with Mr. Leif prior to the investigation.

In advance of the hearing, Mr. Leif reviewed the charge letter and written statements of the yard master and crew members involved in the September 4, 2010 accident. (Tr. 279). From these statements and a phone conversation with Mr. Lobello, Mr. Leif was able to establish a general understanding of the switching operation at issue. The day prior to the hearing, he was given a copy of the operating rules involved, the locomotive event recorder download, the switching list, the track chart of the Cotton warehouse yard, and photographs of the locomotives involved.

As the hearing officer, Mr. Leif questioned the Carrier witnesses and the three charged Employees. Mr. Duplechain and the charged employees were given the opportunity to ask their questions as well. Mr. Leif did not ask any questions about Complainant's injuries, which Mr. Leif stated were not relevant to or at issue in the formal investigation. He instructed witnesses not to answer certain questions asked by Mr. Duplechain during the investigation hearing. (CX-32, pp. 63, 87). Mr. Leif believed the formal investigation was fair and impartial. However, he stated that he did not apply any written code of ethical or procedural rules in conducting the hearing. (Tr. 304).

As is standard practice when the hearing officer is not the person issuing the discipline letter, Mr. Leif prepared a written summary of the hearing and evaluated what took place. (RX-38; CX-17). He found that Mr. Case and Mr. Naquin had not violated any operating rules, and that Complainant had violated some operating rules; Complainant was not found in violation of conduct Rule 1.6 regarding gross negligence. (RX-38, pp. 1 and 3; CX-17, pp. 1 and 3; Tr. 284, 286). Mr. Leif also concluded that Complainant was controlling the movement on Track 18, and as such he was responsible for a safety stop, which was not performed. (Tr. 284-285; RX-38, p. 2; CX-17, p. 2). His report also noted that Complainant had testified at the investigation that he was able to see the rolling cars and the standing cars from his position on the locomotive. (Tr. 286; RX-38, pp. 2-3; CX-17, pp. 2-3; CX-32, p. 112). Based on the testimony of Mr. Naquin and Mr. McMillan, the mechanical department officer, and Mr. Leif's review of the event recorder download, Mr. Leif concluded that there was not a hard coupling, and the locomotive was moving between two and four miles per hour at the time of the coupling. (Tr. 286-287; RX-38, p. 2). Mr. Leif testified that he did not consider the fact that Complainant had reported a work related injury on September 4, 2010 as a factor in his findings and recommendations. (Tr. 285 and 291). He also stated that he never felt any pressure to reach a certain conclusion in Complainant's formal investigation in order to obtain more work from Respondent. (Tr. 291).

On cross-examination, Mr. Leif explained that the "That will do" command means for the engineer to stop. (Tr. 292). However, Mr. Naquin testified at the formal investigation that he did not come to a full stop. (CX-32, p. 125). Despite this, Mr. Leif found Mr. Naquin was not in violation of any rules. (Tr. 295).

Mr. Leif has a $3,000 annual retainer agreement with Respondent. Over the last two years, he has charged Respondent about $18,000 for his various services. Mr. Leif stated that he did not present the railroad's case against Complainant even though it is his role as hearing officer to question the witnesses. He acknowledged that the formal investigation is not governed by written rules of procedure or ethical standards.

With regard to the event recorder download, Mr. Leif determined that the important information was the speed and the activity of the brakes and throttle, rather than the direction of travel indicated. He had only been given the data from the download that represented what happened up until the 17 minutes before the time the three involved employees indicated the accident happened. (Tr. 310-311). On re-direct examination, Mr. Leif stated that he did not need any additional data after 2:57 p.m.; he did not think it was necessary or pertinent to the formal investigation. (Tr. 318). Mr. Leif is now representing Respondent in the appeal of Complainant's formal investigation. (Tr. 457).

Mr. Leif stated that there was no evidence admitted in the formal investigation regarding Complainant's discipline and injury history and that it would have been inappropriate to do so. However, he stated that Mr. Lobello and Mr. McCrossen had told him in their separate pre-hearing meeting that Complainant had other formal discipline findings on his record. Mr. Leif testified that he did not become aware of prior injuries until after making his recommendation to terminate Complainant; however, his email refers to Complainant's prior personal injury. (Tr. 312-313; CX-17, pp. 3-4).

VII. David Duplechain

Mr. Duplechain has been employed by Respondent as a switchman since 2002. He is also the state legislative director and general chairman on Respondent's property for UTU.

Mr. Duplechain stated than an engineer looking out the cab window has a panoramic view when operating a locomotive short nose forward. According to Mr. Duplechain, The engineer always operates the locomotive; however, if there are cars coupled to the locomotive, someone other than the engineer controls the movement. (Tr. 161). When the engineer is operating the locomotive light engine, short nose forward, the engineer controls the movement of the locomotive and the switchman is not supposed to give the engineer instructions or commands unless he sees something has gone wrong. As Mr. Naquin was operating light engine, short nose forward at the time of Complainant's injury, Mr. Duplechain agreed that he would not have given the engineer any instructions about making a safety stop or car count if he had been the switchman.

As a union representative, Mr. Duplechain is involved in the process of resolving rule violation charges. Once a charge letter is issued, a meeting with the Union representative and the employee usually follows, at which the discipline proposed is specified. Though not in this instance, there is generally an effort at an informal resolution. This informal process can involve a "waiver", whereby the employee waives the investigation and grievance process and admits to at least some responsibility, and then Respondent usually imposes lesser discipline as a result. (Tr. 169-170).

Mr. Duplechain testified he is unaware of any policy that Respondent has regarding how many accidents or rules violations an employee is allowed before that employee is terminated. (Tr. 170).[12] Mr. Duplechain testified that he has seen memos stating that employees who report injuries are automatically disqualified from applying for certain jobs with Respondent. (Tr. 171; CX-35; CX-36). With regards to the job descriptions presented as CX-35 and CX-36, Mr. Duplechain stated that a person applying for these positions would need to be in good physical condition. (Tr. 192). He has not known of any managers who have been terminated or disciplined for a safety issue. He also testified that managers or supervisors do not get charged with rule violations and go through investigations because they are not union employees. (Tr. 195).

On cross-examination, Mr. Duplechain stated that he is representing Complainant in his appeal. In informal discussions with Mr. Lobello, he addressed the fact that Complainant's charge letter used the language "including but not limited to" in listing the rules Complainant allegedly had violated. (Tr. 179). This was the first time Mr. Duplechain had seen such language in a charge letter, and this language was not in compliance with the CBA. (Tr. 157-159). Mr. Duplechain represented Complainant, Mr. Naquin, and Mr. Case at the formal hearing, but he did not assert that Mr. Naquin had violated certain rules in efforts to defend Complainant.

[12] Mr. Lobello testified in agreement. (Tr. 231).

Mr. Duplechain stated that if Complainant believed Mr. Naquin was operating the locomotive at an excessive rate of speed, he should have communicated that to Mr. Naquin. Additionally, Mr. Duplechain stated that if Complainant was in a position to see an imminent collision, he would also have a duty to communicate that.

On re-direct examination, Mr. Duplechain stated that Mr. Mixon should not have been the charging officer for Complainant's September 4, 2010 accident if Mr. Mixon was the trainmaster that day as he would not have been impartial. As the charging officer he would be the one to represent the Respondent's case at the formal investigation, but Mr. Mixon was not present that day. Instead, Mr. Leif the hearing officer hired by Respondent, represented the Respondent. (Tr. 197). Mr. Leif did not ever ask to meet with Mr. Duplechain before or after the formal investigation. Mr. Duplechain stated that it was "difficult" representing all three employees who were involved in the investigation of the September 4, 2010 accident; however, he found their stories were not vastly different. (Tr. 201).

With regard to the photographs presented as CX-25 and CX-27, Mr. Duplechain stated that there was nothing from the photos that indicated Complainant nor Mr. Naquin could see the standing cut of cars behind the rolling box car from their respective positions on the locomotive.

VIII. <u>Thomas Lobello</u>

Mr. Lobello has worked for Respondent nearly 18 years and is currently the Chief Operating Officer. He is primarily responsible for the transportation department. Mr. Lobello testified safety meetings have been held for various crews in that department, and about 10 to 15 employees serve on a safety committee. According to Mr. Lobello, the injury rate at Respondent's facility has gone down over the last three years since appointing Mr. John McCrossen as manager of safety.

The internal control plan is Respondent's written policy against retaliation, discrimination, and harassment. Implementation of the internal control plan is the ultimate responsibility of Respondent's general manager. In his deposition testimony, confirmed at trial, Mr. Lobello stated that he was unaware of any managers who had been counseled, reprimanded, investigated, or terminated in the last 18 years for violations of the internal control plan. Mr. Lobello did not know of anything that the general manager had done to ensure compliance with the internal control plan while Complainant was employed by Respondent.

In the time Mr. Lobello has worked for Respondent, he said he has never seen a manager investigated in relation to an employee accident or taken a pay cut because of failure to comply with the FRSA. He did recall instances where managers have been demoted and had pay cuts because of other violations. Mr. Lobello also testified that there are instances where employees have violated rules and not been terminated.

Rule 12 of the CBA states that "When investigations are to be held, the employee shall be given written notice as to specific charge, time and place". (CX-31, p. 1). Mr. Lobello did not agree that this Rule requires that the employee be given written notice of every rule that he is charged with violating prior to the formal investigation. Mr. Lobello had no proof that Complainant received the charge letter sent to him in connection with the September 4, 2010 accident. (Tr. 226).

Mr. Lobello explained that when Mr. Bridger became the general manager, he retained Labor Associates, Inc., through which company Mr. Leif came to be hired as the hearing officer in the formal investigation of Complainant's accident. Mr. Leif was paid $1,500 a day and had acted as hearing officer on two other cases for Respondent. Beyond the CBA, Respondent does not have any other procedural rules in place for formal investigation proceedings.

Mr. Lobello agreed that there is no policy in place regarding how many rules violations, accidents, or injuries an employee can have before he is terminated. The decision to terminate Complainant was based on the facts brought out in his formal investigation "as well as his display of being an unsafe employee prior to this particular accident." (Tr. 232). Mr. Lobello could not name any other employee of Respondent who has been terminated after being charged with the same rules violations Complainant was charged with. Mr. Lobello did not attend the formal investigation of Complainant's accident.

Mr. Lobello, as Chief Operating Officer, is responsible for ensuring compliance by the managers with the FRSA. He testified that he had not "looked at it yet" and did not know what is considered protected activity under the FRSA. (Tr. 234). Mr. Lobello stated that Complainant's filing of his FELA claim or hiring lawyers did not have anything to do with his decision to terminate Complainant. If Complainant had not reported his accident and Mr. Lobello had not known anything about it, Mr. Lobello agreed that Complainant would not have gone to formal investigation and he never would have been terminated. (Tr. 235).

With regard to the memo written by Mr. Lobello dated November 12, 2007 (CX-33), Mr. Lobello explained that the deduction from employees' paychecks was the consequence of the safety incentive program. The management implemented the program to promote a safe workplace by agreeing to pay 100% of the union employees' health and welfare if no one was hurt on the job. Otherwise, if an injury was reported or claims were filed against Respondent, deductions would be made from all employees' paychecks, excluding managers.

Complainant was cited as violating the rule on making a safety stop in General Superintendent's Bulletin Notice Number 32 (CX-14; RX-7) in his termination letter (CX-18). Mr. Lobello acknowledged that the rule in CX-14 had been superseded multiple times since it was issued in 2007.[13] (Tr. 241; CX-15; CX-16; RX-8). However, this rule was not cited as a

[13] Mr. Leif, the hearing officer, testified that he would find Complainant violated the policies stated in Bulletin Number 32 (CX-14; RX-9) as well as the policies in the revised version outlined in Bulletin Number 06-10 (CX-16; RX-7). (Tr. 290).

potential violation in the charge letter. (CX-6; CX-7; CX-8). Mr. Lobello testified that at prior hearings, rules have been introduced that were not on the charge notice. To his knowledge, UTU has never filed a grievance about this issue. (Tr. 427).

Mr. Lobello testified Respondent received the "Jake Award" for its safety record from the Regional Shoreline Railroad Association each year from 2006-2009. Mr. Lobello estimated there are about two to three accidents with injuries in the transportation department each year and less than one termination a year. RX-48 is a document compiled monthly to report on personal injuries as required by the FRSA. The tables show, and Mr. Lobello confirmed, that for the injuries reported in 2009, 2010, and through April 2011, the injured employee in each case was not disciplined, except for the two separate accidents in 2010 in which Complainant was injured. (RX-48). Mr. Lobello testified that employees who have injuries on the job but do not report them can later be found to be in violation of the workplace rules and would be subject to formal investigation. Mr. Lobello explained that a formal investigation is not held for every injury or incident, but did not explain how the decision is made on whether to conduct an investigation.

Mr. Lobello conceded he met with Mr. Leif the day before Mr. Leif conducted Complainant's formal investigation to "bring him up to speed" and give him the statements and evidence already gathered. (Tr. 431). He testified that he did not try to influence Mr. Leif's decision in that meeting. Mr. Lobello reviewed the formal investigation transcript and exhibits and the recommendation email from Mr. Leif in making his decision to terminate Complainant. (Tr. 432-433). Mr. Lobello ultimately concluded Complainant was in control of the movement and therefore at fault for causing the September 4, 2010 accident. (RX-32, pp. 27, 32, 33). Mr. Lobello also testified that the "progression of unsafe behavior as close as four months before" the September 4, 2010 accident and other occasions where Complainant was found in violation of the rules also contributed to his decision to terminate Complainant. (Tr. 438-439; RX-10; RX-14; RX-20; RX-23). However, Mr. Lobello denied that the fact Complainant was injured as a result of the September 4, 2010 accident played a part in the decision to terminate Complainant. (Tr. 442).

Mr. Lobello did not write the job postings presented as CX-35 and CX-36, but he said both employees ultimately hired for the positions had prior personal injuries. According to Mr. Lobello, Complainant could have applied for these positions even though he was not in the advertised department and had a prior personal injury on the job as long as that injury would not restrict him from performing the job duties required. He also noted that the safety incentive program had been suspended prior to Complainant's termination. (CX-33).

Mr. Lobello testified that when an engineer does not understand or does not get a communication from the switchman, the engineer is supposed to stop the movement in progress. According to Mr. Lobello, Mr. Naquin followed Complainant's instructions in the job briefing. Mr. Naquin did not stop the movement because Complainant had told him to follow the cars down the track and received no further communication to change the movement or to stop.

Mr. Lobello testified that he told Mr. Leif after the formal investigation proceedings that Respondent would consider Complainant's prior disciplinary actions in making a final determination about the discipline to administer with regard to the September 4, 2010 accident. However, he said he did not discuss Complainant's injuries during that conversation. (Tr. 460).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact and conclusions of law that follow are in part those proposed by the parties in their post-hearing briefs. Where I agreed with the summations, I adopted the statements rather than rephrasing the sentences. The facts and conclusions were determined by me from the evidence, the pleadings, and the parties' exhibits.

1. Complainant was employed as a Switchman/Conductor by Respondent for approximately six years.

2. On September 4, 2010, Complainant was working as a Helper switching cars at the Cotton Warehouse in New Orleans, Louisiana, with Engineer Gary Naquin and acting Foreman Ellis Case.

3. Complainant was injured when the locomotive, operated by Engineer Naquin, collided with a cut of standing cars.

4. At the time of the accident, Complainant was standing on the conductor's side step on the outside of the locomotive.

5. When the accident occurred, Engineer Naquin was operating the locomotive light engine and short nose forward, meaning there were no cars coupled to the locomotive, and it was oriented with the short end facing the direction of movement.

6. Engineer Naquin admitted there is no rule requiring the switchman to give a car count or safety stop command to the engineer when the engineer is operating "light engine".

7. On Complainant's command, Engineer Naquin kicked a cut of cars onto Track 18 and followed them down the track.

8. As a result of the impact, Complainant sustained injuries to his neck and back.

9. Complainant reported his injuries to supervisory personnel and was taken by ambulance to the local hospital emergency room.

10. Following the accident, Respondent's Safety Director John McCrossen visited Complainant in the hospital and investigated the accident.

11. Mr. McCrossen took statements from Engineer Naquin, Foreman Case, Yardmaster Michael Majoue, and Trainmaster Alvie Mixon.

12. Foreman Case was not in the area when the accident occurred and said he "didn't hear or see anything". (CX-4).

13. Other than Engineer Naquin, none of the witnesses had any personal knowledge about the accident.

14. Respondent did not conduct a reenactment of the accident until after the formal investigation and after Complainant was terminated, about a month before the trial of this case.

15. Complainant gave his statement ten days following the accident, seven days after the notice of investigation was issued.

16. Complainant is a member of the United Transportation Union ("UTU"), which has a Collective Bargaining Agreement ("CBA") with Respondent.

17. The CBA has as its aim not to terminate employees but to educate them constructively, and discipline should not be used as a tool of intimidation.

18. If the employer contemplates discipline, the CBA indicates that employer must give notice of its intent within seven days of the incident that gives rise to the discipline.

19. A meeting with Union representatives and the worker usually follow the charge letter, at which the Company specifies the discipline it proposes and makes an effort at informal resolution. This informal process can involve a "waiver", whereby the worker waives the investigation and grievance process and admits to at least some responsibility, and the company usually imposes lesser discipline in exchange.

20. These informal preliminary steps were not taken in Complainant's case regarding the September 4, 2010 accident.

21. Rule 12(a) of the CBA between Respondent and Complainant requires Respondent to give an employee written notice "as to specific charge, time and place, sufficiently in advance to afford him the opportunity to arrange for representation…" (CX-31).

22. Rule 12(b) of the CBA states that no switchman will be disciplined without responsibility being established by the holding of a fair and impartial investigation. (CX-31).

23. Rule 12(c) of the CBA requires "notice of such investigation, stating the charge or charges involved shall be given to the employee within 7 calendar days of the date of the offense…" (CX-31).

24. Respondent's charge letter stated that the crew members were being investigated for violations "including but not limited to" three GCOR rules. (CX-6). This was the first time Mr. Duplechain, the union representative, had seen language like this in a charge letter.

25. A formal investigation was scheduled for September 14, 2010, but was postponed by mutual agreement until April 5, 2011.

26. Trainmaster Mixon was the "charging officer" in this matter. Fred Leif was hired by Respondent to serve as the hearing officer for the formal investigation hearing.

27. Engineer Naquin and Foreman Case were charged with precisely the same violations as Complainant, and all three were represented by Mr. Duplechain at the formal investigation.

28. Prior to the hearing, Mr. Leif held *ex parte* meetings and received documents and information from Mr. Lobello and Mr. McCrossen, but he had no meetings with Complainant's representative, David Duplechain.

29. Mr. Leif applied no written procedural, evidentiary or ethical rules to the proceedings.

30. Mr. Leif interrogated the witnesses and allowed evidence and testimony to be presented regarding Complainant's potential violation of Rules other than those listed in the charge letter issued.

31. General Superintendent Tom Lobello's letter of termination dated April 14, 2011 listed GCOR Rule 1.1 and the rule in General Superintendent's Bulletin Notice No. 32 dated December 11, 2007, as bases for Complainant's termination.[14]

32. The Charging Officer Alvie Mixon never appeared at the hearing.

33. Complainant gave Mr. Naquin a command to stop, and although Mr. Naquin applied the independent brakes, the train failed to stop completely before hitting the standing cars.

34. Engineer Naquin said he "…followed the cars down track with 2008 engine. Cars coupled up. Went to put independent brake on. Engine did not come to a complete stop before couple to cars [*sic*]." (CX-5).

35. GCOR Rule 1.47(B)(1) makes the engineer responsible for the safe and efficient operation of the locomotive.

36. Engineer Naquin was required by GCOR Rule 6.28 to operate the locomotive at a speed that allowed him to stop within half the distance between his locomotive and the rail cars he was following down the track.

[14] See FN12.

37. The event recorder data submitted into evidence at the hearing ended 17 minutes before 3:15 p.m., which was the time Complainant, Foreman Case, and Engineer Naquin all reported the accident occurred.

38. Mr. Leif instructed witnesses not to answer questions asked by the Union Representative.

39. It is obvious from the evidence and despite his denial that Mr. Leif received information from Mr. Lobello regarding Complainant's prior discipline and injury history, which was not presented as part of the formal investigation hearing.

40. Mr. Leif sent an email to Mr. Lobello detailing his conclusions after the hearing.

41. Mr. Leif's email stated that he recommended termination in this case based on this violation and the prior discipline records including another finding of fault in causing his personal injury.

42. Mr. Leif has been hired by Respondent and another railroad in New Orleans to preside over four formal investigations.

43. Mr. Leif charges $1,500 a day for his services and agreement with Respondent.

44. Based on Mr. Leif's recommendations, Complainant was found by Mr. Lobello to have violated GCOR Rules 1.1.1 and 1.1.2, Respondent's Rule 1.1, and General Supplemental Bulletin Notice No. 32 and its subsequent versions.

45. Mr. Naquin and Mr. Case were exonerated of all charges, and Complainant was terminated.

46. Respondent's Safety Incentive Program, under which no employee in the transportation department received a bonus if any employee reported an injury during any given quarter, did not apply to managers.

47. Respondent does not have any written rule or policy that an employee will be terminated after a defined number of injuries, accidents, or rule violations.

48. Respondent has no procedural, evidentiary or ethical rules governing Formal Investigation proceedings.

49. Respondent's Chief Operating Officer Mr. Lobello, who is responsible for ensuring compliance with the FRSA, could not identify what are considered protected activities under the Act and at trial admitted he had not ever reviewed the Act.

50. No witness could identify any other employee of Respondent's who had been terminated for violating the rules Complainant was terminated for violating.

51. The evidence reveals Respondent has a history of discriminating against employees who report injuries.

52. Mr. Lobello stated he did not terminate Complainant because he hired an attorney or filed a FELA claim.

53. Mr. Lobello acknowledged Complainant would not have been terminated if he had not reported the injuries to his neck and back on September 4, 2010.

54. Respondent has a history of tying employee bonuses and benefits to injury reports.

55. Respondent has no process for review of disciplinary decisions by an attorney or a human resources department before they are carried out.
56. Complainant engaged in protected activity under the Act when he reported his injury on September 4, 2010.

57. Respondent knew Complainant had engaged in protected activity.

58. Complainant was subjected to an adverse personnel action when he was terminated by Respondent.

59. The protected activity was a contributing factor in Respondent's decision to terminate Complainant.

60. Complainant proved each of the elements of his claim by a preponderance of evidence.

61. Respondent failed to meet its burden of showing by "clear and convincing evidence" that it would have terminated Complainant even if he had not reported his workplace injuries.

62. Respondent acted with indifference and disregard for Complainant's federally protected rights. Punitive damages will be assessed against Respondent as a result.

63. Complainant has provided only minimal evidence that he suffered compensable emotional distress as a result of being terminated.

64. Complainant is entitled to reinstatement to his previous position with Respondent with no loss of seniority or benefits.

65. Complainant is entitled to have his record expunged of any reference to his termination and the filing of his FRSA claim.

66. Complainant is entitled to reasonable attorney's fees and costs.

DISCUSSION

I. Applicable Provision

Complainant alleges that Respondent violated § 20109(a)(4), which provides:

> A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done—
>
> **(4)** to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee;

49 U.S.C. § 20109(a)(4).

II. Elements of the FRSA Violation & Burdens of Proof

Actions brought under the FRSA are governed by the burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, ("AIR 21"). *See* 49 U.S.C. § 20109(d)(2)(A)(i). Accordingly, to prevail, a FRSA complainant must demonstrate that: (1) his employer is subject to the Act, and he is a covered employee under the Act; (2) he engaged in a protected activity, as statutorily defined; (3) his employer knew that he engaged in the protected activity; (4) he suffered an unfavorable personnel action; and (5) the protected activity was a contributing factor in the unfavorable personnel action. *See* 49 U.S.C. § 42121(b)(2)(B)(iii); *Clemmons v. Ameristar Airways Inc., et al.*, ARB No. 05-048, ALJ No. 2004-AIR- 11, slip op. at 3 (ARB June 29, 2007).

The term "demonstrate" as used in AIR 21, and thus the FRSA, means to "prove by a preponderance of the evidence." *See Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 01-AIR-3, slip op. at 9 (ARB Jan. 30, 2004). Thus, Complainant bears the burden of proving his case by a preponderance of the evidence. If Complainant establishes that Respondent violated the FRSA, Respondent may avoid liability only if it can prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of Complainant's protected behavior. *See* 49 U.S.C. §§ 20109(d)(2)(A)(i); 42121 (b)(2)(B)(iii)(iv).

a. Protected Activity

By its terms, the FRSA defines protected activities as including acts done to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee. 49 U.S.C. § 20109(a)(4). The evidence readily establishes that Complainant engaged in protected activity under § 20109(a)(4) by

notifying Respondent of the work-related injury that he sustained on September 4, 2010. In their briefs, the parties both agree that Complainant's injury report constituted protected activity under the Act.

b. Knowledge of Protected 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 Case No. 04-112, ALJ No. 2003-AIR-38 (ARB Jan 31, 2006); *Peck v. Safe Air Int'l, Inc.*, ARB Case No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004). There is no question that the person responsible for terminating Complainant's employment, Chief Operating Officer Thomas Lobello, was aware of Complainant's protected activity. (RX-32). Thus, Respondent had knowledge of Complainant's protected activity.

c. Unfavorable Personnel Action

By its terms, the FRSA explicitly prohibits employers from terminating employees who engage in protected activity. The parties do not dispute and the evidence establishes that Complainant was subjected to adverse employment action when he was dismissed from employment with Respondent by letter dated April 14, 2011. (CX-18; RX-39).

d. Contributing Factor

i. *Complainant's protected activity contributed to Respondent's decision to terminate his employment.*

Complainant's burden is to prove by a preponderance of the evidence that his reporting of his injury was a contributing factor in Respondent's decision to terminate his employment. A contributing factor is any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision concerning the adverse personnel action. *See Marano v. Dept. of Justice*, 2 F.3d 1137 (Fed. Cir. 1993); *Allen v. Admin. Rev. Bd.*, 514 F.3d 468, 476 n. 3 (5th Cir. 2008).

A complainant is not required to provide direct evidence of discriminatory intent; he may satisfy his burden through circumstantial evidence. *Evans v. Miami Valley Hospital*, ARB Nos. 07-118, -121, ALJ No. 2006-AIR-22 (ARB June 30, 2009), *Clark v. Pace Airlines, Inc*., ARB No. 04-150, ALJ No. 2003-AIR-028, slip op. at 12 (ARB Nov. 30, 2006). Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity *See*, *e.g.*, *Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-33, slip op. at 13 & n.69 (ARB Sept. 30, 2011) (citing *Sylvester v. Parexel Int'l. LLC,* ARB No. 07-123, ALJ Nos. 2007-SOX-39, -42, slip op. at 27 (ARB May 25, 2011)*; Bobreski v. J. Givoo Consultants, Inc,* ARB No. 09-057, ALJ No. 2008-ERA-3, slip op at 13

(ARB June 24, 2011). In circumstantially-based cases, the fact finder must carefully evaluate all evidence of the employer's agent's "mindset" regarding the protected activity and the adverse action taken. *Timmons v. Mattingly Testing Services*, 1995-ERA-40 (ARB June 21, 1996). The fact finder should consider "a broad range of evidence that may prove, or disprove, retaliatory animus and its contribution to the adverse action taken." *Id.* at 5.

Several factors combine in this case to support Complainant's argument that his protected activity was a contributing factor in his termination. Respondent's approach to the investigation of Complainant's injury and rule violation was biased and unfair. Complainant's statement of what happened on September 4, 2010 was not taken until after the formal investigation hearing was set and the charge letter was issued. A reenactment did not take place until well after Complainant was terminated. Complainant was not offered informal resolution in this matter as union employers are generally offered when formal discipline is contemplated. It appears that management had decided how this matter would be resolved before the investigation began. Complainant was not given a chance to avoid termination or formal investigation by accepting responsibility this time as he had been in the past and is general practice at the company. While Mr. Leif was ostensibly hired to offer an objective and expert perspective of the events, he had more to gain from finding a violation on the part of Complainant and recommending termination. Mr. Leif obtains his work as a consultant exclusively from railroad management, not from union employees. The formal investigation hearing itself was a tainted process as Mr. Leif had prior access to information in making his final determination that was never presented on the record. Mr. Duplechain admittedly found it difficult to represent three parties in the proceedings. The investigation efforts were merely pretext and the circumstantial evidence surrounding it combines to establish retaliatory intent on the part of Respondent.

Furthermore, if Complainant had not reported his injury in September 2010, Mr. Leif and Mr. Lobello would not have had occasion to review Complainant's disciplinary records. Mr. Lobello stated at trial that if Complainant had not reported his injury there would not have been a formal investigation, and Complainant never would have been terminated in relation to that injury. Mr. Lobello stated that evidence of the "progression of [Complainant's] unsafe behavior as close as four months before" the September 4, 2010 accident and other occasions where Complainant was found in violation of the rules contributed to his decision to terminate Complainant. Complainant may have a history of other safety violations; however, the fact remains that his report of the injury of September 4, 2010 triggered Mr. Lobello's review of his personnel records, which led to his termination. *See DeFrancesco v. Union R.R. Co.*, ALJ No. 2009-FRS-00009, slip op. at 7-8 (ARB February 29, 2012).

Therefore, I find Respondent's decision to terminate Complainant violated the direct language of the FRSA, which provides that a railroad carrier may not "discharge" an employee when the employee's actions are "due, in whole or in part, to the employee's lawful, good faith act done." 49 U.S.C. § 20109(a). The statute provides that a "good faith act" includes "notify[ing]" the railroad employer of "a work-related personal injury". 49 U.S.C. § 20109(a)(4). In light of the statute and the framework for proving a contributing factor under AIR 21 and the facts discussed above, I conclude that Complainant's reporting of his injury was, more likely than not, a contributing factor to his termination.

Respondent urges that this court should not second guess the exercise of the company's business judgment in making personnel decisions, as long as such decisions are not discriminatory or retaliatory. The Administrative Review Board has held that it is proper to examine the legitimacy of an employer's reasons for taking adverse personnel action in the course of concluding whether a complainant has proved by a preponderance of the evidence that protected activity contributed to the adverse action. *Brune v. Horizon Air Industries, Inc.,* ARB No. 04-037, ALJ No. 2002-AIR-8, slip op. at 14 (ARB Jan. 31, 2006) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). Proof that an employer's explanation is unworthy of credence is persuasive evidence of retaliation because once the employer's justification has been eliminated, retaliation may be the most likely alternative explanation for an adverse action. *See Florek v. Eastern Air Central, Inc.,* ARB No. 07-113, ALJ No. 2006-AIR-9, slip op. at 7-8 (ARB May 21, 2009) (citing *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 147-48 (2000)).

However, to discredit an employer's proffered reason for taking an adverse personnel action, the Complainant "cannot simply show that the employer's decision was wrong or mistaken since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent or competent." *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994). The court should not become a "super-personnel department that reexamines the merits or even the rationality of an entity's business decisions." *Brewer v. Quaker State Oil Refining Corp*., 72 F.3d 326, 332 (3d Cir. 1995); *Dister v. Continental Group, Inc.*

In determining whether Complainant has met his burden of proof, I did not make an attempt to second guess Mr. Lobello and Mr. Leif's determinations that Complainant was guilty of certain rules violations. That inquiry is distinct from the fact that the business decision made was in violation of the Act. While the facts may be clear that Complainant was responsible for his own injury, which I decline to address further, it does not change the fact that the reason the investigation was initiated and the way it was conducted shows that the decision to terminate Complainant was adverse to the Act and at least in part motivated by Claimant's report of injury.

ii. ***Respondent has failed to show it would have terminated Complainant had he not reported his injury.***

Once Complainant has shown that his protected activity was a contributing factor to the adverse employment action, Respondent is liable unless it can prove by clear and convincing evidence that it would have taken the same action absent the protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv); *Patino v. Birken Manufacturing Co.*, ARB No. 06-125, 2005-AIR-23 (ARB July 7, 2008). Clear and convincing evidence is "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain." Black's Law Dictionary 577 (7th ed. 1999). As a general proposition, proof that an employer's "explanation is unworthy of credence" is persuasive evidence of discrimination because "once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation" for an adverse action. *Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133, 147-48 (2000).

Evidence that any given misconduct or performance failure would, standing alone, lead to termination could take many forms. These include established written policies than mandate or at least suggest termination under the circumstances; established practices, such as a fair and honest, good faith, and complete investigation was conducted and substantiated the alleged misconduct or performance failure; examples of similarly situated employees whose employment also was terminated; a showing of the seriousness of the event in the context of the employer's business needs (*e.g.,* theft, dishonesty, or disclosure of company trade secrets) or the health and safety of its employees (*e.g.,* fighting or bringing weapons to work) or similar factors; citation to the CBA's provisions on termination; and practices in place to safeguard against discriminatory or retaliatory acts (such as requiring the human resources or legal department to conduct an independent review of the termination decision).

On all of these points, Respondent has offered little evidence. It points to no similarly situated employees treated the same. In fact, Complainant was the only employee who had been disciplined between 2009 and April 2011 for an on-the-job personal injury. While Complainant was injured twice in 2010, he was the only employee injured in those incidents. Although an outside consultant conducted a disciplinary hearing, Respondent left it to Mr. Lobello to decide independently on the level of discipline; there was no check against possible improper motive. Mr. Lobello testified that he knew of no way the internal control plan had been implemented to prevent retaliation. There's no evidence that Respondent took into account that terminating an injured employee would tend to discourage workers from reporting injuries, despite the statutory mandate protecting, and the Company policy requiring, such reports.

In their brief, Respondent asserts that Complainant would have been terminated even without his protected activity "as it is obvious" termination would be the "next step in the progressive discipline." (Resp. Brief p. 44). However, Respondent offered no evidence of a policy of objective criteria used by the company for disciplining employees. Mr. Lobello testified that there is no policy in place regarding how many rules violations, accidents or injuries an employee can have before he is terminated. While evidence of Complainant's disciplinary history is presented on record, there is nothing presented that would substantiate Respondent's assertion that termination was the apparent next step for Complainant. This is especially true considering Complainant has on several occasions in the past accepted responsibility in the incidents for which he has been subject to discipline. Additionally, there is no indication that an investigation would have taken place without Complainant's injury report. There was no mention of physical property damage, a policy necessitating an investigation in cases of a collision, or any other issue that would have triggered an investigation regardless of whether Complainant had suffered an injury. Far from clear and convincing, Respondent offered next to no evidence to show that it would have terminated Complainant's employment had he not reported the injury.

III. <u>Damages</u>

When a rail carrier violates the Act's employee protection provision, the Act provides relief to make the Complainant whole, including reinstatement with restoration of seniority and back pay with interest. It also provides for compensatory damages, including emotional distress,

litigation costs, expert witness fees, and reasonable attorney's fees. Finally, Congress has provided for possible punitive damages not to exceed $250,000. 49 U.S.C. § 20109(e).

Throughout his pleadings, both pre- and post-trial, Complainant seeks reinstatement, expungement of references to his termination in his disciplinary record, compensatory damages, punitive damages, and attorney's fees, but specifically states he is not eligible to recover past lost wages because the nature and extent of his injuries would have prevented him from working even had he not been terminated.[15]

A. Reinstatement and Back Pay

As asserted in his brief, Complainant was unable to work after his September 4, 2010 accident, despite his termination. Therefore, he does not seek back pay. However, I find Complainant is entitled to reinstatement. If his former job no longer exists, Respondent shall unconditionally offer him reinstatement to a substantially equivalent position in terms of duties, functions, responsibilities, working conditions and benefits. To make Complainant whole, Respondent must expunge any negative references in its records (including Complainant's personnel file and any managers' desk files) to Complainant's injury, his report of the injury, his complaint about Respondent's failure to comply with the Act, and his termination.

B. Compensatory Damages for Emotional Injury

The Supreme Court has long required that compensatory damages for emotional distress "be supported by competent evidence concerning the injury." *Cary v. Piphus*, 435 U.S. 247, 264 n. 20, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978). Failure to establish an "actual injury" with sufficient evidence will result in the award of only nominal damages. *Id.* At 266-267. While a complainant need not submit corroborating testimony, the complainant's testimony alone may only be sufficient to prove mental damages if the testimony is "particularized and extensive." *Brady v. Fort Bend County*, 145 F.3d 691, 718 (5th Cir 1998); *see also Forsyth v. City of Dallas*, 91 F.3d 769 (5th Cir. 1996), *and Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1047 (5th Cir. 1998). Furthermore, 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).

In the present case, Complainant lost his job and he described the subsequent effects that event has had on his life. Complainant felt he could no longer do anything for his family. His wife lost her job and his son is no longer doing as well in school. As a result of the termination, Complainant lost his health insurance and the job insurance benefits he received from various policies did not compare to the salary he was earning before. Complainant testified that the termination has resulted in tension and stress in his household. Complainant was receiving some financial benefits up until April 2012.

[15] Though not specifically stated, it appears Complainant is seeking his lost wage benefits under the Federal Employers Liability Act (FELA).

Regardless of his testimony, I do not find that Complainant has presented evidence of an emotional injury with sufficient specificity to establish entitlement to more than nominal compensatory damages for such. He reported general stress, yet on a form dated August 4, 2011, Complainant reported to his physician that he was "stress free". (Tr. 148; RX-49, p. 1). On a form dated September 14, 2010, it was indicated Complainant had no anxiety or panic disorders, depression, or any other disorders. (Tr. 149; RX-49, p. 3). Complainant did not give testimony about when the stress began or the specific ways it manifested to cause him injury; he did not seek treatment for alleged emotional distress. No other witnesses testified to corroborate Complainant's testimony. While there is no doubt that losing one's job is stressful, Complainant has only provided evidence to support a nominal award of $1,000.00 in compensatory damages.

C. Punitive Damages

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, 3) the sanctions imposed in other cases for comparable misconduct. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 523 U.S. 424, 434-35 (2001). Punitive damages are appropriate in whistleblower cases to punish wanton or reckless conduct and to deter such conduct in the future. *Anderson v. Amtrak*, 2009-FRS-00003, slip op. at 26 (Aug. 26, 2010), *citing Johnson v. Old Dominion Security*, 86-CAA-3/4/5 (May 29, 1991).

I find Respondent in this case has demonstrated reckless indifference to the legal rights of Complainant under the Act. Respondent has no objective criteria in place or specific guidance on the levels of discipline that are imposed on its employees. Sometimes accidents and injuries are brought to formal investigation, sometimes they are not. Sometimes employees are terminated for rules violations and sometimes they are not. No guidelines or fast rules for how these decisions are made could be cited by any witness at trial. Additionally, there is no policy requiring review of disciplinary decisions, including termination. While there is an "internal control plan" in place, there was no indication that it was implemented in this case to prevent retaliation or discrimination. In the past, Respondent has tied employee bonuses and benefits to injury reporting. Most surprisingly, Mr. Lobello, who is in charge of ensuring the company's compliance with the FRSA, admitted at trial that he has never reviewed the Act and was not familiar with the types of protected activity under the Act. How can Respondent defend itself as a company concerned with the legal rights of its employees when the manager responsible for such protection is ignorant of those rights? As a result, I find punitive damages are appropriate to correct and deter this conduct. I assess punitive damages in the amount of $25,000.

D. Attorney's Fees and Costs

Lastly, Complainant is entitled to reasonable costs, expenses and attorney fees incurred in connection with the prosecution of his complaint. 49 U.S.C. § 20109(e)(2)(C). Counsel for Complainant has not submitted a fee petition detailing the work performed, the time spent on such work or his hourly rate for performing such work. Therefore, Counsel for Complainant is

granted twenty (20) days from the date of this Decision and Order within which to file and serve a fully supported application for fees, costs and expenses. Thereafter, Respondent shall have twenty (20) days from receipt of the application within which to file any opposition thereto.

IV. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Respondent shall provide Complainant reinstatement to his former employment with the same pay, terms and privileges of employment that he would have received had he not been terminated and continued working from April 14, 2011.

2. Respondent shall expunge from the employment records of Complainant any adverse or derogatory reference to his protected activities of September 4, 2010, and his discriminatory termination on April 14, 2011.

3. Respondent will pay Complainant $1,000 in compensatory damages.

4. Respondent will pay Complainant $25,000 in punitive damages.

5. Counsel for Complainant shall have twenty (20) days from the date of the Decision and Order within which to file a fully supported application for fees, costs and expenses. Thereafter, Respondent shall have twenty (20) days from receipt of the fee application within which to file any opposition thereto.

ORDERED this 19th day of October, 2012, at Covington, Louisiana.

C. RICHARD AVERY
Administrative Law Judge

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

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

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

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

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

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

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

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