U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue Date: 28 March 2013

Case No. 2012-FRS-00014

In the Matter of:

SHAUN M. CARR,
Complainant,

v.

BNSF RAILWAY CO.,
Respondent.

APPEARANCES:

Robert J. Friedman, *Esq*.
Law Offices of C. Marshall Friedman, P.C.
St. Louis, Missouri
For the Complainant

Andrea Hyatt, *Esq*.
Jennifer Willingham, *Esq*.
BNSF Railway Co.
Fort Worth, Texas
For the Respondent

John E. Patterson, *Esq*.
Coates & Logan
Overland Park, KS
For the Respondent

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the employee protection provisions of the Federal Rail Safety Act ("FRSA" or "Act"), 49 U.S.C. § 20109, and the applicable regulations contained at 29 C.F.R. Part 1982. The procedural regulations applicable to hearings before the Office of Administrative Law Judges are found at 29 C.F.R. Part 18. In this case, the Complainant, Shaun M. Carr ("Complainant") alleges that the Respondent, Burlington Northern & Santa Fe Railway Company ("Respondent") violated the FRSA by retaliating against him for notifying the company of a workplace injury. He seeks actual, compensatory, and punitive damages, reinstatement, and reimbursement of attorney's fees, costs, and expenses incurred in pursuing this matter. For the reasons set forth below, I find that the Complainant has failed to prove by a preponderance of the evidence that his injury report was a contributing factor in the Respondent's decision to terminate his employment; therefore, I dismiss the complaint.

In this Decision and Order, "JX" refers to the Joint Exhibits, "CX" refers to the Complainant's Exhibits, "RX" refers to the Respondent's Exhibits, "ALJX" refers to the Administrative Law Judge's Exhibits, and "Tr." refers to the transcript of the hearing held on August 21-22, 2012, in Kansas City, Kansas.

Procedural History

The Complainant filed a whistleblower retaliation complaint with the United States Department of Labor, Occupational Safety and Health Administration ("OSHA") on October 14, 2010. (JX 35). On November 29, 2010, the Respondent answered and objected to the complaint. (JX 36). On December 23, 2011, the Regional Administrator of OSHA denied the complaint, finding no cause to believe the Respondent had violated the FRSA's whistleblower provision. (JX 39). On January 16, 2012, the Complainant objected and requested a hearing before an administrative law judge. (JX 40).

On February 9, 2012, I issued a Notice of Assignment and Intent to Schedule a Telephone Conference, notifying the parties that the case had been assigned to me and of my intent to schedule a conference with the parties to discuss a hearing date, other case deadlines, and the manner in which the case would proceed. On May 8, 2012, I issued a Notice of Hearing and Pre-Hearing Order, noting that the telephone conference was conducted on April 26, 2012, and that the parties had agreed that a hearing would be held on August 22, 2012, in Kansas City. I set June 22, 2012, as the final deadline for discovery and June 28, 2012 as the deadline for dispositive motions.

On July 2, 2012, the Respondent filed a Motion for Summary Decision and supporting memorandum. The Complainant filed his Response on July 12, 2012. The Respondent filed a Motion for Leave to file a Reply on July 20, 2012, and the Complainant objected. I denied the Respondent's Motion for Leave to file a Reply, finding that the parties' briefs and supporting materials were sufficient to allow me to rule on the motion. On August 16, 2012, I issued a Decision and Order Granting in Part and Denying in Part Respondent's Motion for Summary Decision. I found that the Respondent was entitled to summary decision on the issue of whether the Complainant's injury report was a contributing factor in the Respondent's police officers' decision to file criminal charges, because the Respondent successfully demonstrated the absence of a genuine issue of material fact that the officers—the sole decision-makers as to the filing of criminal charges—were unaware of the Complainant's injury report, and the Complainant failed to set forth specific facts showing a genuine issue of material fact on that specific allegation. I denied, however, summary decision on whether the Complainant's injury report was a contributing factor in his termination.

The hearing commenced as scheduled on August 21-22, 2012, in Kansas City, Kansas. At the hearing, the parties were represented by counsel. ALJX 1-19 and JX 1-46 were admitted into the record. (Tr. 9). RX 1-9 and CX 2 and 4 were admitted, while CX 1 and 3 were excluded. (Tr. 98, 145, 149, 221, 297, 300, 378, 382, 446, 466). The following witnesses testified at the hearing:

1. Christopher Cain, the Complainant's co-worker (Tr. 27-45);
2. Michael Williams, the Complainant's union representative (Tr. 46-53);
3. The Complainant (Tr. 54-168);
4. Stephanie L. Carr, the Complainant's wife (Tr. 171-77);
5. David Wood, employee of the Respondent and the Complainant's former co-worker (Tr. 178-91);
6. Christopher Halk, Assistant Claims Manager for the Respondent (Tr. 194-209);
7. John Reppond, General Foreman III for the Respondent (Tr. 210-52);
8. Captain Joe White, Special Agent in Charge of the Respondent's police force (Tr. 254-92);
9. Darrin Suttles, Conducting Officer of the Complainant's disciplinary investigation resulting in discharge (Tr. 301-48);
10. Joseph Heenan, Director of Labor Relations for the Respondent (Tr. 349-408); and
11. Dennis K. Bossolono, Shop Superintendent for the Respondent (Tr. 409-69)

At the conclusion of the hearing, the parties were given until October 24, 2012 to submit post-hearing briefs. (Tr. 472). The parties' post-hearing briefs have been received.

Evidentiary Rulings

On October 26, 2012, the Respondent filed a Motion to Accept Additional Evidence into the Record. I denied the Respondent's motion in an Order dated November 15, 2012, because the record was closed and the Respondent failed to show why the evidence was "not readily available prior to closing of the record" as required by 29 C.F.R. § 18.54(c).

The Complainant also filed a Motion for Leave to Add Exhibit into Evidence with his post-hearing brief. The Complainant seeks to admit a Decision and Order of Judge Daniel F. Solomon in the Whistleblower case of *Christopher J. Cain v. BNSF*.[1] Mr. Cain testified in this hearing. (Tr. 27-45). Although I find Mr. Cain's testimony of limited probative value as his allegations are factually distinct, I will admit the exhibit into evidence as CX 5 because the trial transcript has already been admitted as RX 5. (I note that the Complainant also testified in Mr. Cain's case, but Judge Solomon refused to consider his testimony because he found that the Complainant and Mr. Cain were not similarly situated employees.). In response to the Complainant's submission, the Respondent submitted its Petition for Review of Judge Solomon's Decision and Order. I will admit the Petition for Review as RX 10.

On February 15, 2013, the Complainant filed a Motion to Supplement the Record, seeking to admit into the record an Order from the United States District Court for the District of Kansas, Honorable Julie A. Robinson, dated February 14, 2013. On March 1, 2013, the Respondent objected to the Complainant's motion, arguing that the Order is not material. Obviously, this Order was unavailable prior to the closing of the record in this case, as it post-dates the hearing. Therefore, I will admit the Order into the record as CX 6.

[1] Case No. 2012-FRS-19 (ALJ Oct. 9, 2012).

Issues

The ultimate issue in this case is whether the Complainant's protected activity was a contributing factor in his termination. As will be explained more fully below, there is no real dispute that the Complainant engaged in protected activity by filing an injury report and that he suffered an unfavorable personnel action when he was fired. The crux of the case is therefore whether the Complainant's injury report was a "contributing factor" in his termination.

Stipulations

The stipulations in this case all relate to damages, in the event that the Respondent is found liable. The parties stipulated that at the time of his dismissal, the Complainant was earning approximately $3,877.40 per month. (Tr. 14). The parties agree that the Complainant's last day of work was April 25, 2010, and that from April 26, 2010 through the last day of trial is 27 months and 2 weeks. (*Id*.). Should the Respondent be found liable, the parties agree that the Respondent is entitled to an offset from any back-pay award of $10,290.00, representing the amount of the Complainant's unemployment benefits from mid-June 2010 to mid-January 2011; and $20,887.50, representing the amount the Complainant earned working for the City of Olathe from mid-December 2011 to August 22, 2012. (Tr. 15). The parties also agree that the Complainant is not seeking an award of emotional distress or mental anguish damages. (*Id*.).

Factual Background and Testimony

Before summarizing the hearing testimony and the exhibits, I will provide a brief background of the undisputed facts in this case. The Complainant started working for the Respondent as an equipment operator in February 2006. He worked at the Respondent's Argentine, Kansas location. On October 11, 2007, the Complainant alleged he injured his back pulling a derail switch; he informed the Respondent of this injury on October 15, 2007. He was disciplined four times, in October 2007, December 2007, January 2008, and February 2008. He was terminated in June 2010.

The Complainant's termination arose from an incident that occurred on April 14, 2010. A smart-display screen valued at approximately $8,000.00 was found shattered in locomotive 7572, which was at the Argentine location for maintenance. The Complainant vigorously denies breaking the screen, but two of his co-workers (David Wood and Robert McCall) signed sworn-statements and testified that he was responsible for breaking the screen. Based on an investigative hearing that occurred on May 7, 2010, the Respondent's officers—John Reppond, Dennis Bossolono, and Darrin Suttles—determined that the Complainant was responsible for breaking the screen and terminated the Complainant's employment effective immediately. The Complainant challenged his termination with the Public Law Board as provided in the Union's collective bargaining agreement, but the termination was upheld as based on substantial evidence.

The Respondent's police officers conducted a criminal investigation into the broken screen. On May 3, 2010, based upon the results of their investigation—particularly the sworn statements of Mr. Wood and Mr. McCall—Officer Andrew Paalhar, at the direction of Captain

Joe White, filed an Affidavit for Application for Warrant with the Wyandotte County, Kansas, District Attorney. On May 5, 2010, the Assistant District Attorney filed an Information charging the Complainant with felonious destruction of property. (JX 21). On August 16, 2011, Judge Robert P. Burns, Wyandotte County District Court, found the Complainant not guilty of the criminal charge after a bench trial. (JX 27 at 227). The Complainant alleged that the filing of the Affidavit for Application for Warrant was a retaliatory action in violation of the FRSA, but I granted summary decision in favor of the Respondent on that claim as the Respondent proved that the officers had no knowledge of the Complainant's injury report and made the decision to file the Affidavit on their own without input from the Respondent's management. Thus, the officers could not have filed the Affidavit in retaliation for the injury report if they did not even know about it, nor could they have been a mere "Cat's Paw" of the Respondent's management if management did not direct, encourage, or induce them to file the charges.

A. Hearing Testimony

1. Christopher Cain

Christopher Cain was a co-worker of the Complainant at the Respondent's Argentine locomotive maintenance and inspection terminal (LMIT). (Tr. 27). He was a sheet metal worker. (Tr. 28). His direct supervisors were Paul Schakel, John Reppond, and Dennis Bossolono. (*Id.*). Cain injured himself in an accident while driving a BNSF truck in early 2010 and was later terminated in June 2010. (*Id.*). Cain alleged that his termination was retaliation for reporting the injury. (Tr. 32). He also filed a whistleblower claim against the Respondent. (CX 5). On October 9, 2012, Judge Solomon ruled Cain's favor and awarded damages. (*Id.*). The Respondent has appealed Judge Solomon's order. (RX 10).

The parties have also submitted the hearing transcript from Cain's trial. (RX 5). However, although I have reviewed the transcript, I find that it is irrelevant. Cain's situation is factually distinct from the Complainant's. The underlying facts giving rise to Cain's and the Complainant's retaliation claims are completely unrelated, and I find that it is unnecessary and would be improper to re-litigate Cain's retaliation claim in this decision and order. The Complainant maintains that the point of Cain's testimony was to establish a "pattern of continuing conduct" of retaliation on the Respondent's part. (Tr. 26). I find that even assuming Cain was retaliated against, that one instance of retaliation would not establish a pattern of retaliation.[2] Therefore, I find that Cain's testimony and the exhibits submitted relating to his retaliation claim against the Respondent are irrelevant and of no probative value in this case.

2. The Complainant

The Complainant testified that he started working for the Respondent as a mechanical laborer in February 2006. He remained a mechanical laborer for a few years until he entered the

[2] *See Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984) (stating in a Title VII discrimination case that in order to prove a "pattern or practice" of discrimination, a plaintiff must show more than "isolated or sporadic discriminatory acts"; rather, the plaintiff must show that "'discrimination was the company's standard operating procedure—the regular rather than the unusual practice.'") (quoting *Teamsters v. United States*, 431 U.S. 324, 336 (1977)).

machinist apprenticeship program; however, due to layoffs in May 2009, he was forced to return to his mechanical laborer position. (Tr. 55-56). He testified that he injured his back on October 11, 2007 while pulling a derail switch, and submitted a report within seventy-two hours. (Tr. 56; JX 2). The Complainant was placed on medical leave from October 14, 2007 to November 4, 2007. (JX 3). On October 16, 2007, the Complainant was placed on work restrictions of no pushing, pulling, or lifting over five pounds, no work above shoulder level, and no bending of the lumbar spine. (JX 4). He was cleared to return to work with no restrictions on November 1, 2007. (JX 6). Shortly after returning to work, the Complainant was assessed what would be the first of four disciplinary violations prior to his termination.

a. The Overtime Discipline

The Complainant's first disciplinary incident with the Respondent arose from an incident on September 25, 2007, in which he was charged with working twenty-two minutes of overtime without performing any duties. (JX 5). On October 24, 2007, the Complainant waived his right to an investigation and accepted responsibility for the violation. (JX 5). (An "investigation" is the term the Respondent uses for internal hearings on disciplinary matters. In this Decision, I will also use that term so as not to confuse an internal disciplinary hearing with the hearing in this case). He was issued a non-serious offense with a ten-day record suspension (meaning he did not have to actually miss any work) and placed on probation for one year. (*Id*.).

At the hearing, however, the Complainant testified that he did not, in fact, violate any overtime rules and that he only waived his right to an investigation on the violation on the advice of his union representative. (Tr. 58-59). According to the Complainant, his union representative told him the discipline was only a "slap on the hand" and recommended he waive his right to an investigation "so we don't have to go through the whole proceeding of a formal investigation." (Tr. 59). The Complainant believes he would not have been disciplined for the overtime violation but for his filing the injury report. (*Id*). On cross-examination, the Complainant testified that prior to his injury report, Bossolono had called him into his office to question him about the overtime. (Tr. 96). According to the Complainant, Bossolono told him, "I'll be God damned if anyone is going to steal from this company." (Tr. 97). Pursuant to a notice of investigation dated October 17, 2007, the investigation for this discipline was scheduled for October 18, 2007, but was postponed while the Complainant was on injury leave. (RX 1; Tr. 97). He explained that he was under the impression that when he met with Bossolono prior to the injury, it was "up in the air" as to whether disciplinary charges would be brought against him, and he believes that ultimately Bossolono would not have brought the charges if he had not filed an injury report shortly thereafter. (Tr. 152).

b. The Defective Derail Discipline

The Complainant was disciplined a second time on December 6, 2007. (JX 7). He was charged with failing to notify the proper authorities of the defective derail switch that caused his back injury in a timely manner. At the investigation on this violation, the Respondent's foreman, Matt Brallier, testified that he did not learn of the defective derail until three days after the Complainant's injury when he saw that the Complainant had been taken out of service for an injury. (JX 7 at 8). According to Brallier, an employee who encounters a dangerous condition at

work is supposed to notify a supervisor or foreman. (JX 7 at 11). The Complainant agreed that he did not tell anyone about the derail except for Ed Denney, an electrician who the Complainant referred to as "the safety guy" and believed was the appropriate person to tell about the derail. (JX 7 at 22, 24). Ed Denney had previously served as a safety director but no longer served in that capacity at the time of the injury. (JX 7 at 17). Nevertheless, the conducting officer of the investigation, Bryan Gordon, determined after the hearing that the Complainant had violated Rule S-28.4, which states: "Employees must cooperate and assist in carrying out the rules and instructions. They must promptly report any violations to the proper supervisor. They must also report any condition or practice that may threaten the safety of trains, passengers, or employees, and any misconduct or negligence that may affect the interest of the railroad." (JX 32 at 4; JX 7 at 1). For this violation, the Complainant was given a twenty-day record suspension and placed probation for one year. (JX 7 at 1).

c. The Locker Discipline

The Complainant's next disciplinary incident occurred in January 2008. (JX 8). This incident arose from the Complainant's failure to follow instructions to move his locker. The Complainant explained at the hearing that there are two parts of the Argentine LMIT facility: the "house" and the "DSF." (Tr. 62). At one point he worked primarily in the DSF, but he later "bid out" and moved over to the house. (*Id*.). He kept his DSF locker when he moved. (*Id*.). One of the supervisors at the DSF, Paul Schakel, told the Complainant that he needed to move his locker to the house. According to the Complainant, he tried to move his locker on a couple occasions, but his immediate supervisor would not allow him to do so during working hours. (Tr. 63). Moreover, the Complainant felt that he was being singled out, because there were other people who lockered at the DSF but did not work there, so he wrote a letter expressing his concerns and gave it to Paul Schakel. (*Id*.). The Complainant testified that he was notified only a few days later of an investigation for refusing Schakel's order to move lockers. (Tr. 64).

The investigation of the locker incident happened on January 18, 2008. (JX 8 at 3). Bryan Gordon conducted the investigation, the purpose of which was to determine if the Complainant had violated rules S-28.13, Reporting and Complying with Instructions, and S-28.6 Conduct, Dishonesty. Paul Schakel testified that on December 27, 2007, after having previously told the Complainant several times over the recent weeks to vacate his locker at DSF, he asked the Complainant if he had moved his locker, and the Complainant told him he had. (JX 8 at 7). However, on January 3, 2008, Schakel found the Complainant changing his clothes at the DSF locker. (*Id*.). Schakel wrote an email to Bossolono recommending that the Complainant be disciplined for failing to comply with instructions and dishonesty. (JX 8 at 41). The Complainant's representative, Clintel Betts, objected, arguing that there was no rule stating where employees had to locker; Schakel agreed there was no such rule, but responded that generally employees are expected to locker where they work. (JX 8 at 9). The Complainant admitted that Schakel told him to move his locker, but he maintained that Schakel never asked him if he had actually *moved*, only if he had *found* a new locker at the house. (JX 8 at 18). The Complainant testified that he told Schakel, "Yeah, I found some lockers." (JX 8 at 19).

On January 30, 2008, Bryan Gordon determined that the Complainant was responsible for violating rules S-28.13 and S-28.6. (JX 8 at 1). The Complainant was given a level S-serious

offense, a thirty-day record suspension and placed on probation for three years. (*Id*.). The discipline letter stated that in assessing discipline, consideration was given to his disciplinary history. (*Id*.). The Complainant testified that he did not know of anyone who was disciplined so harshly for failing to move their locker. (Tr. 64).

d. The Unauthorized Leave Discipline

The Complainant's fourth and final disciplinary incident prior to his termination occurred in February 2008. This discipline related to the Complainant's attendance problems. The Complainant called off of work on Sunday, December 16, 2007. (Tr. 65). He called in and told Brallier, the general foreman, that his back was hurting and he was not able to work. (Tr. 66). The Complainant was charged with violating Rule S-28.14, Reporting or Absence. (JX 9 at 1). The investigation was conducted by John Reppond on January 18, 2008. (JX 9 at 4). Brallier testified that the Complainant did call off work on December 16, 2007, and that at the time he called-off, the Complainant already had seven call-offs. (JX 9 at 8). A letter dated November 7, 2007, was introduced at the investigation showing that the Complainant had signed a form acknowledging his seven absences up to that point and stating, "The next occurrence that you incur will start the formal progression of discipline as per the Mechanical Attendance Policy." (JX 9 at 32). Brallier stated that he did not give the Complainant permission to be off on December 16, 2007; rather, he merely noted that the Complainant would not be at work that day. (JX 9 at 11). Brallier knew at the time that the Complainant had a prior work-related back injury, and he also knew that the Complainant had been released to duty without any restrictions on November 1, 2007. (JX 9 at 14-15).

The Complainant testified at the investigation that he could not explain why he had seven prior absences. (JX 9 at 15). He did not understand why that was relevant, and did not wish to take the opportunity to explain. (JX 9 at 15-17). He knew he was on special handling when he called off (meaning he needed permission from the general foreman to be absent from work). (*Id*.). He stated that he called in and told Brallier that he would not be coming in due to a sore back. (JX 9 at 18). He believed that Brallier's telling him "okay, keep me informed, keep us in the loop" was permission to be absent. (JX 9 at 19). Brallier replied that he did not give the Complainant permission, and there were no special circumstances, so the Complainant was subject to discipline per the Attendance Policy for his eighth unauthorized absence. (JX 9 at 20-21).

On February 15, 2008, Reppond determined that the Complainant had violated Rule S-28.14 and issued him a non-serious offense with a record suspension of ten days per the Mechanical Team Attendance Policy. (JX 9 at 1). The Complainant was also placed on probation for one year. (*Id*.).

e. The Bossolono Meetings

The Complainant next testified about a meeting on Thursday, September 16, 2009 with Bossolono, which the Complainant believed was harassing. When he arrived at work, he was told to go see Bossolono. (Tr. 69). Waiting for him in Bossolono's office were Bossolono, Reppond, and Clintel Betts (his union representative). The Complainant testified that Bossolono

asked him if he had a lawsuit against the Respondent, and he said yes. (Tr. 70). Bossolono then circled a paragraph from the Complainant's FELA lawsuit that alleged that the Complainant was suffering from "severe, permanent, progressive, and disabling" injuries resulting in, among other things, "limitation of function," and asked the Complainant to explain because he was "afraid to let me walk to the parking lot, let alone with co-workers because of what this paragraph had said." (Tr. 71). The Complainant testified that he was scared for his job. (*Id*.). According to the Complainant, at that point, Betts spoke up and said that the Complainant could not be taken out of service as he had been released by the Respondent's doctors and had been performing his job since that point. (Tr. 72; *see also* Tr. 154). But Bossolono still wanted to know what that paragraph meant. (Tr. 72.). Betts suggested the Complainant return at a later date after speaking with his attorneys, and Bossolono agreed. (*Id.*).

The Complainant spoke with his attorneys, who told him the lawsuit was a legal matter and that he should tell Bossolono to contact them if he had any questions. (Tr. 73). The Complainant returned to Bossolono's office with Betts the following Monday, September 21, 2009. (*Id*.). The Complainant testified Bossolono was angry because he was supposed to return on Saturday morning, but the Complainant had work to do, so "I did my job" and went to Bossolono's office on Saturday afternoon instead, but Bossolono was already gone. (*Id.*). At the meeting on Monday, the Complainant testified that he told Bossolono the lawsuit was a legal matter and he would have to contact his attorneys with any questions about it. (*Id.*). According to the Complainant, Bossolono said the Complainant had been "coached" and instructed him and Betts to wait outside his office. (*Id*.). Twenty to twenty-five minutes later, the Complainant testified, Bossolono came out of his office and said, "Here at BNSF, we feel any employee that has a work injury deserves to get compensated for his or her loss. We want to let you know this is not retaliation and that you're free to go back to your job." (Tr. 74).

f. The Broken Computer Screen in Locomotive 7572

The incident for which the Respondent claims it terminated the Complainant occurred on April 14, 2010. There is no dispute that on that day a computer screen in locomotive 7572 was found destroyed. After an investigation, the Respondent determined that it was the Complainant who destroyed the screen. The Complainant vigorously denies that he broke the screen.

At the investigation, two of the Complainant's co-workers—Bob McCall and David Wood—testified that the Complainant broke the screen. They had both previously given sworn statements to the Respondent's police officers to the same effect. (JX 14, 15). McCall's statement said:

> On the morning of 4-18-10, which was a Sunday, I learned of the broken computer screen from Mark Storkman during out morning line-up. After line-up I was in the locker room with Shaun Carr and asked him what was bothering him because he looked upset. He replied that nothing was wrong [illegible] then told me he broke the screen. I asked him what happened and he said he was reclining in the locomotive seat with his feet up messing with his phone when he dropped the phone, leaned over to pick it up, lost his balance, kicked his foot to keep from

> falling which is when he broke the screen. On Tuesday about halfway through our shift Dave Wood and I were discussing the situation when Shaun Carr came into the locker room where we were. Dave began to encourage Shaun to own up for breaking the screen. At which Shaun replied that "they" (meaning the company BNSF and investigators) didn't have anything on him and that they were only trying to scare someone into talking.

(JX 14).

> Wood's statement said:
>
> Me and Bob McCall and Shaun Carr went to check email after line-up on Wednesday. Shaun didn't get a certain email and was upset. Later in the day we were working a track, got done and went back to a locomotive that had air conditioning on. Shaun Carr and I David Wood went back to the locomotive to cool off. When he leaned the seat back said Mother Fucker and I heard the screen break. Shaun told me he broke the screen and left the cab. I got out of the cab a few minutes later when I noticed how bad the damage was.

(JX 15). Prior to giving this statement, Wood had told the police that he did not know anything about the broken screen. (JX 22 at 90).

At the hearing, the Complainant suggested that Wood and McCall had ulterior motives in testifying against him. He suggested that McCall, who was one person below the Complainant in seniority, wanted the Complainant's job. According to the Complainant, McCall "made it quite clear to me several times in front of others that he wanted the position." (Tr. 76). The Complainant also testified that he and McCall had a confrontation outside of work, which he believed was another reason McCall lied. (Tr. 77). As for Wood, the Complainant testified that Wood was strong-armed into lying by McCall, who had information about Wood's alleged marital infidelity and threatened to disclose it if Wood didn't lie. (Tr. 79). The Complainant testified that as he was walking off the Respondent's property after being terminated, Wood told him that McCall said, "If I didn't go up there with him, Bob was threatening to tell." (Tr. 136; see also Tr. 138).

The Complainant also testified that a BNSF foreman, Chris Wolpner, told him that other locomotives had come into the Argentine LMIT with damaged computer screens. (Tr. 88). According to the Complainant, four locomotives came in with damaged screens after he was fired. (*Id.*).

On cross-examination, the Complainant did not deny that he was in locomotive 7572 on the night the screen was found damaged. (Tr. 123). He testified, "If it came through the DSF, then yes, I was in the cab." (Tr. 123-24). Regarding the Respondent's police officers, the Complainant testified that they told him they had video and a boot print of the person who broke the screen. (Tr. 127). The Complainant believed this was tantamount to falsifying evidence. (Tr. 128).

During the hearing, the Complainant maintained that he was not given the opportunity for a fair investigation into the broken screen, because he wasn't allowed to fully present his case. (Tr. 132). At several points during the investigation, the conducting officer, Suttles, stopped Betts from questioning Wood and McCall about their motives to testify against the Complainant. (Tr. 159-63). He believes that the outcome of his investigation was pre-determined, because the Affidavit for Application for Warrant was issued prior to the investigation. (Tr. 141).

After the Complainant was terminated, he testified that he attended Kansas Community College full time from mid-January to mid-December 2011. (Tr. 143). He denied working for a company called Baird Heating & Cooling during this time. (Tr. 144). According to the Complainant, he was helping out the owner of Baird Heating & Cooling, who is a "good friend," but he was not being paid as an employee. (*Id*.). The Respondent showed the Complainant a copy of his job application with the City of Olathe, wherein the Complainant stated that he worked for Baird Heating & Cooling from May 2010 to July 2011 at a salary of $1,200 per month. (Tr. 146; RX 3). According to the Complainant, he was actually "like an intern" at Baird, and when he applied for the job at the City of Olathe, he called his friend, the owner of Baird, and asked him what he would pay someone with his experience and skill level, and that is what he put on the job application. (Tr. 165).

3. Michael Williams

Williams was the Complainant's union representative for the National Conference of Fireman and Oilers. He has participated in union members' disciplinary hearings since 1976 until he retired in June 2011. (Tr. 48). He testified that his advice to union members who filed injury report and received discipline was to "figure out how to get out of the spotlight" because "you got a bulls-eye on your back." (Tr. 49). Williams had a conversation with Ollie Wick, the Respondent's general director of labor relations, after the Complainant's termination regarding dropping the criminal charges. (Tr. 53). Wick and Williams discussed a potential settlement of the Complainant's FELA lawsuit. (JX 27 at 216). The Respondent objected to Williams testifying about the substance of the conversation on the grounds that confidential settlement negotiations are inadmissible under 29 C.F.R. § 18.408; I sustained the objection. (Tr. 52).

4. Stephanie L. Carr

The Complainant's wife testified that one of the Respondent's claims-adjusters, Chris Halk, made comments to her that she perceived as threats. She testified that she would encounter Halk at the school their children attend, and that he once made a comment "along the lines of, 'Oh, don't worry, I'm only dangerous at the railroad, not here.'" (Tr. 172). Mrs. Carr also testified that in August 2010, Halk's wife took photographs of her with the Complainant. (Tr. 175). Lastly, Mrs. Carr testified that Halk screamed at her at a pancake breakfast at their children's school. (*Id*.). All of the incidents that Mrs. Carr testified to occurred after the Complainant was terminated. (Tr. 177).

5. Christopher Halk

Chris Halk testified in response to Mrs. Carr's testimony. He testified that he had no role in the Complainant's termination or any other disciplinary matters. (Tr. 195). Halk disputed Mrs. Carr's version of what transpired at the pancake breakfast. According to Halk, Mrs. Carr, who was serving pancakes at the breakfast, commented that his pancakes were "special pancakes" and flipped them on a heater instead of handing them to him. (Tr. 198). At this point, Halk testified that he responded to Mrs. Carr by saying, "You don't need to accost me in the parking lot. You don't need to be doing any of that here. This is not the place. This is not the time. This is a school and it's not appropriate." (*Id.*). He testified that he did not raise his voice when saying this to Mrs. Carr. (*Id*.).

6. David Wood

David Wood testified that he worked with the Complainant and that they had a good working relationship. (Tr. 179). He testified that he was working with the Complainant on April 14, 2010 when the computer screen was damaged. (*Id*.). They were cleaning the toilets on the locomotives. (*Id*.). Wood testified that he initially stated that he did not know anything about the broken screen because he "didn't want to see anybody get in trouble." (Tr. 180). According to Wood, he changed his statement because he did not want to get in trouble and was advised by his union representative, Williams, to come forward and tell the truth. (Tr. 190). The second time he met with the Respondent's police—Officers White and Paalhar—he told them that the Complainant was responsible for breaking the screen. (Tr. 181). He testified that the statement he gave to the police, which is contained at JX 15 and copied above, is a true and accurate account of the events that took place on April 14, 2010. (Tr. 182). According to Wood, the statement was given freely, without fear of threat, or promise of reward. (*Id*.). Wood denies that McCall blackmailed him into testifying against the Complainant, and he also denies having told the Complainant that McCall threatened him into testifying. (Tr. 183).

7. John Reppond

John Reppond is the General Foreman III for the Respondent. (Tr. 210). He has worked for the railroad for thirty-nine years. (*Id.*). As a general foreman, he oversees the Argentine facility, including all personnel issues. (Tr. 211). Reppond testified that learned about the destruction of the computer screen from an email sent to him by the general foreman of the shift (Brallier). (Tr. 212). While the police were conducting their investigation, a union representative approached Reppond and asked him if two employees would be allowed to change their stories. (Tr. 213). Reppond said yes, and that he would "have to see" about leniency. (*Id*.).According to Reppond, "The one employee provided information that he was in the cab when the screen was destroyed and the other employee, his statement said that [the Complainant] actually confessed to him that he had done it." (Tr. 213-14).

Reppond reviewed the investigation transcript and concluded that the Complainant should be fired for destroying company property and for dishonesty. (Tr. 214). Reppond testified that he genuinely believed Wood and McCall were telling the truth. (Tr. 215). In making the decision to dismiss the Complainant, Reppond also considered the Complainant's past

disciplinary history. (*Id*.). He testified that he did not consider anything other than the Complainant's disciplinary history and the transcript and exhibits. (*Id.*). Reppond further testified that the Complainant's injury report played no role in his dismissal, that he would have made the same decision had the Complainant never reported an injury, and that he harbored no retaliatory animus against the Complainant for filing the injury report. (Tr. 217). Reppond also testified that he was not involved with the Respondent's police officers' criminal investigation, and that he was not consulted about whether to file criminal charges with the District Attorney. (Tr. 223).

Reppond attended the September 2009 meeting in Bossolono's office during which Bossolono questioned the Complainant about his FELA lawsuit. (Tr. 224). He testified that the purpose of the meeting was to "see if these restrictions [which were alleged in the lawsuit] were in fact in place and if he was safe to work on the property." (Tr. 225). According to Reppond, there was no intent to harass the Complainant about the lawsuit, and in fact, Bossolono told the Complainant, "I don't care to talk about the lawsuit. I want to know if you're safe to work." (*Id.*).

Reppond was the conducting officer of the Complainant's investigation for unauthorized absence/excessive absenteeism. (Tr. 229). According to Reppond, the Complainant "had been counseled numerous times" about being absent and was in "special handling," which requires employees with seven or more absences to contact their general foreman to be off work. (*Id.*). The investigation was commenced because the Complainant's call-off on December 16, 2007 was his eighth call-off. (Tr. 230). As the conducting officer, Reppond was not satisfied with the Complainant's inability to explain his absences. (Tr. 232; *see also* JX 9 at 17 (the Complainant is asked, "Can you explain why you were at the Superintendent's seventh occurrence in [the attendance policy]?", he answers, "No. . . . Is that relevant to this?"). Reppond maintained that the Complainant's injury report played no role in his decision to discipline the Complainant for excessive absences. (Tr. 232). Furthermore, Reppond testified, he has issued discipline for attendance issues on "well over 40" occasions, and the discipline given to the Complainant for the absences was "right on line" with what is given to other employees with similar attendance issues. (Tr. 233).

8. Captain Joe White

Captain White is the special agent in charge of the Respondent's railroad police in Southwestern Oklahoma, Kansas, Missouri, and Southern Illinois. (Tr. 254). He has worked in law enforcement since 1977. (Tr. 254-55). Captain White explained that as a railroad police officer, he is a state officer with federal jurisdiction and can go anywhere in the United States to investigate crimes committed against the railroad. (Tr. 256). Captain White learned of the vandalism to locomotive 7572 on April 15, 2010 (the day after the incident) after being informed by Curtis Wagers, a fellow officer. (Tr. 258). Because Wagers could not properly conduct the interviews necessary for the investigation due to his shift, Captain White assigned the case to Officer Andrew Paalhar. (*Id*.). The first step in the investigation was to contact the supervisors at the Argentine LMIT to get a list of employees who may have worked on or around locomotive 7572 on April 14, 2010. (*Id.*). He and Officer Paalhar interviewed between five and ten individuals. (Tr. 259). In the course of their investigations, Captain White explained that they used "normal police tactics to attempt to elicit information and to obtain what we believe would be finger pointing towards a certain individual." (*Id*.). By "normal police tactics," Captain White

was referring to exaggerating the evidence they had, such as stating they had boot prints and fingerprints (although he did not remember if they stated they had video). (Tr. 270-71). They did not read the interviewees their Miranda rights because "no one was a suspect at that time." (Tr. 258-59). All the individuals they initially interviewed, including the Complainant, stated they "had no idea what happened to that screen." (Tr. 260).

A few days after the initial round of interviews, Captain White was contacted by "someone from the LMIT diesel shop" who stated that Wood and McCall wanted to speak with him. (Tr. 262). Captain White testified that Wood informed him he had information on the screen, and that his conscience was bothering him and he wanted to tell truth. (Tr. 263). Captain White then had Wood write out his statement, which has been introduced into the record at JX 15. (*Id*.). At this point, Captain White also spoke with Robert McCall, who was not one of the employees initially questioned. (Tr. 265). McCall provided Captain White with the statement that appears in the record at JX 14. (*Id*.).

After receiving Wood's and McCall's statements, Paalhar and White called the Complainant back for questioning. (Tr. 266). They advised the Complainant of his Miranda rights, told the Complainant the evidence they had, and gave him the opportunity to explain. (Tr. 267). According to Captain White, the Complainant "jumped up and started screaming, 'I demand to see the evidence you have. You have to show me that evidence. It's law.'" (Tr. 268). At this point, Captain White told Officer Paalhar to "get him out of my office." (*Id*.).

Prior to the second interview with the Complainant, Captain White testified that he had no knowledge of the Complainant's injury report or disciplinary history. (Tr. 269). With the two written statements from Wood and McCall, Captain White believed that they had enough evidence to pursue a criminal prosecution, so he referred the case to the District Attorney's office. (*Id*.). He testified that he did not consult with the Respondent's officers or management in making the decision to refer the case for prosecution. (*Id*.). Captain White explained that it is "100 percent my decision" on whether to refer a case for prosecution, because "they're [the Respondent's management] not my bosses. I don't care about company rules. I don't care about company violations. My main concern is criminal activity. That's what my team investigates and nothing else." (Tr. 270).

9. Darrin Suttles

Darrin Suttles is an assistant general foreman for the Respondent, and as of August 2012, had worked for the Respondent for five-plus years. (Tr. 302). He was the conducting officer of the Complainant's disciplinary investigation into the broken computer screen. (*Id*.). Suttles recalled that Wood was the eye-witness and that McCall testified that he had conversations with the Complainant about the Complainant breaking the screen. (Tr. 307-08). Suttles testified that "both witnesses [came] across as being credible." (Tr. 308). When assessing credibility as the conducting officer, Suttles testified that he looks for body gestures and whether the witness is being sincere or appear to be "stonewalling." (*Id*.). He further explained that he found Wood credible despite his prior inconsistent statement, "because he went back and was cited for that rule violation . . . and admitted and signed a waiver admitting to making a mistake, that he misrepresented the facts on that." (Tr. 308-09).

According to Suttles, the Complainant did not offer any explanation for Wood's alleged lying at the investigation. (Tr. 309). He referred to a question during the investigation in which the Complainant was asked, "Do you know why Mr. Wood would testify as to what he did?" (*Id*.). To which the Complainant responded, "No, maybe, I don't know." (*Id*.; JX 22 at 119-20). He recalled that the Complainant alleged McCall lied because of "business dealings they had about hanging sheet rock or something to that effect." (Tr. 309). He explained that he believed McCall because "he [came] forward with information that he had concerning the incident that we were there to discuss and his testimony, what he said, that he knew something about it and it was eating him up and that he felt he had to get it right." (Tr. 310).

Suttles further testified that during investigations, he tries "to keep the focus on the matter that we're there to investigate on the notice of the investigation." (Tr. 311). He thus maintained that the Complainant's criticism, that the investigation into the broken screen was unfair because he was not allowed to fully question Wood and McCall about their motives to lie, was invalid. (*Id*.). Suttles testified that he did, in fact, allow the Complainant's representative (Williams) to question Wood regarding his alleged seniority-based motive to lie. (Tr. 313). In addition, Suttles maintained that he allowed Williams to question McCall about an alleged snowball incident between him and the Complainant. (Tr. 315). He acknowledged, however, Williams' position that the investigation was not fair and impartial, but noted that the Public Law Board found to the contrary. (Tr. 316; JX 29).

Suttles did not find the Complainant's testimony at the investigation credible. (Tr. 317). According to Suttles, the Complainant stonewalled and "had no explanations for the incident that surrounded what we were there to talk about. (*Id*.). He testified that he shared this view with Bossolono after the investigation. (*Id.*). Suttles explained that after reviewing the testimony and the exhibits introduced at the investigation, he determined that the Complainant was responsible for destroying company property and giving a false statement. (Tr. 319). He maintained that the Complainant's injury report had no bearing on his finding, because he was unaware at the time that the Complainant had even filed an injury report. (*Id*.). He shared his determination with Bossolono, Reppond, and the Respondent's Labor Relations department. (*Id*.). Suttles also testified that he was not involved with the criminal investigation into the broken screen, was not kept informed by the Respondent's police force, and was not involved in their decision to report their findings to the District Attorney. (Tr. 320-21).

On cross-examination, Suttles reiterated that during the investigation, he "just tried as conducting officer . . . to keep the focus on the incident surrounding [the subject of the investigation]." (Tr. 330). When Suttles was asked if that included the topic of seniority, he responded, "again, just trying to keep focus on the incident that surrounded." (*Id*.).

10. Joe Heenan

Joe Heenan works in Labor Relations for the Respondent and was responsible for reviewing the Complainant's termination. (Tr. 350). As the Director of Employee Performance, Heenan reviews "major discipline cases"—those potentially involving actual suspension or termination. (*Id.*). In the Complainant's case, Heenan testified that he reviewed the employee

transcript (which outlines an employee's disciplinary history), the transcript of the formal investigation into the broken computer screen, and the exhibits admitted during that investigation. (Tr. 351). The primary thing Heenan looks for in determining whether discipline is appropriate is whether there is substantial evidence that the employee committed the violation. (Tr. 352). Heenan, who has a law degree, explained that the substantial evidence standard has been developed by the Supreme court to mean "more than a scintilla of evidence," and that it is "certainly different and less than your typical courtroom burdens of proof in terms of beyond a reasonable doubt or preponderance of the evidence." (Tr. 352). Heenan determined there was substantial evidence to find that the Complainant destroyed the computer screen. (Tr. 353). He explained his reasoning for this conclusion as follows:

> The record indicated . . . we have a locomotive cab with the engineer's seat reclined. We know that [the Complainant] reclined in that seat. We know that he was in fact sitting in that seat and we also know that there was an eyewitness in the locomotive cab with him who because of the setup, the general nature of the locomotive cab, couldn't physically see him, but what he heard was [the Complainant] use some profanity. He heard the sound of breaking glass and then he heard [the Complainant] admit that he broke the glass in the locomotive cab. Beyond that, a few days later, what at least the record establishes is there is a couple of locker room conversations in which [the Complainant] admitted to another employee that he was the person who broke the computer screen of the locomotive cab as well as in a conversation after that . . . [The Complainant's hearsay objection is overruled and the Respondent's attorney asks Heenan to continue]. There were actually two locker room conversations. One of them involved [the Complainant's] admission to another employee, I forgot his name, it's either Mr. Wood or Mr. McCall, that he was in fact the one who broke the computer screen on the locomotive. A day or two after that conversation, there was a subsequent conversation in which [the Complainant] was encouraged to, I believe, tell the truth and he indicated his desire that he was not going to, this charade so to speak was going to continue. There was also a suggestion on the record that when questioned by the resource protection officer or BNSF police officers about the incident, he denied having any involvement in it.

(Tr. 355). Heenan also determined there was substantial evidence that the Complainant provided a false statement when he denied breaking the computer screen. (Tr. 357-58).

Heenan also referred to the Respondent's Policy for Employee Performance and Accountability, which was submitted into the record as a joint exhibit as JX 31. (Tr. 359). Heenan testified that this policy provides guidance for determining what level of discipline is appropriate. (*Id.*). Under the policy, Heenan explained, intentional destruction of company property and rule violations resulting in extensive damage to company property are dismissible violations; in other words, violations for which dismissal would be appropriate regardless of the employee's past disciplinary history. (Tr. 360; JX 31 at 8). However, in Heenan's opinion, even if the incident was not a stand-alone dismissible offense, he believed there were "several theories for which dismissal would be appropriate in this case." (Tr. 362). For example, the screen incident at the very least would be a serious offense, Heenan testified, and the policy provides

that two serious offenses in a thirty-six month period will subject an employee to dismissal. (Tr. 363; JX 11 at 3).

Heenan further testified about the appeal process under the Respondent's collective bargaining agreement with the Complainant's union and the Railway Labor Act. (Tr. 367-69). He noted that the Complainant had appealed his dismissal all the way to a federal arbitrator, who ruled in the Respondent's favor. (Tr. 369). The arbitrator's ruling is contained in the record at JX 29. Heenan also testified that the discipline the Complainant received for failing to report the defective derail, failing to move his locker when told to do so, and excessive absences were all upheld by the Public Law Board as well. (Tr. 376-81). The arbitrator's decisions in those cases are included in the record at RX 6-8.

11. Dennis Bossolono

Dennis Bossolono is the Shop Superintendent at the Argentine LMIT, and his duties include issuing employee discipline. (Tr. 409). As such, he was involved in the decision to terminate the Complainant. (*Id*.). He testified that he decided to terminate the Complainant after reviewing the transcript of the investigation regarding the broken screen and exhibits submitted therein, as well as after conferring with the conducting officer of the investigation (Darrin Suttles). (Tr. 410). On October 6, 2010, Bossolono wrote a letter to the Complainant's union representative, Williams, in response to the union's appeal of the Complaint's dismissal. (JX 27 at 183). Bossolono stated that in his view, "the transcript of the investigation conducted on May 5, 2010 illustrates the [Complainant] was in violation of the rules cited in the investigation notice." (*Id*.). He further stated that he found the testimony of Wood and McCall credible. (*Id*.; *see also* Tr. 456). During the hearing, Bossolono acknowledged the Complainant's position that Wood and McCall were lying, but he testified that he believed them over the Complainant. (Tr. 414). Bossolono testified that he was unaware of the Complainant's allegations regarding McCall blackmailing Wood at the time he decided to dismiss the Complainant. (Tr. 416). He testified that the Complainant's injury report played no role in his decision to terminate the Complainant. (Tr. 417). Bossolono provided several examples of employees who have been dismissed for dishonesty in the past (*see* JX 43), and maintained that the Complaint had been treated no differently than other employees who have been found to be dishonest. (Tr. 416-18).

Bossolono further testified that the Complainant's accounting of the September 2009 meetings in his office was inaccurate. (Tr. 419). Bossolono's notes from the meetings are in the record at JX 11. (Tr. 420). The notes from the first meeting on September 16, 2009, state that the Complainant said the allegations in his FELA lawsuit were "truly crazy" and they must have had him mixed up with someone else. (JX 11). Bossolono asked the Complainant if there were any aspects of his job that he could not perform, and the Complainant responded "no. I come every day and work." (*Id*.). The Complainant asked for more time to contact his attorney to "clear up the issue." (*Id*.). On September 21, 2009, Bossolono wrote that the Complainant had returned, and Bossolono allowed the Complainant to continue working as he had been released by medical professionals following his October 11, 2007, injury. (*Id.*). Bossolono testified that he did not schedule the meetings to harass the Complainant, and that he has had similar meetings with other

employees. (Tr. 423). He believed his demeanor was "calm and professional" during the meetings. (Tr. 426).

According to Bossolono, the Respondent's disciplinary and criminal investigations are separate, and he was not "in any way at all" involved in the criminal investigation of the broken computer screen. (Tr. 427). He also testified that the Respondent's police officers did not consult with him about reporting their findings to the District Attorney's office. (Tr. 429; *see also* Tr. 455-56).

Regarding the Complainant's discipline for time-theft (*i.e.*, working twenty-two minutes of overtime without performing any duties), Bossolono testified that the Complainant would have been issued that discipline regardless of his injury report. (Tr. 432). Regarding the Complainant's discipline for failing to report the defective derail, Bossolono testified that the Respondent's employees are trained annually on the Respondent's safety rules, including the reporting of dangerous conditions. (Tr. 436). In Bossolono's view, an employee who encounters a defective derail and does not report it is not following the Respondent's "safety vision," because "the potential for a fellow employee to become injured on that equipment is very real." (Tr. 439). Thus, Bossolono testified that the Complainant would have been issued discipline for failing to report the defective derail regardless of any injury report he filed. (Tr. 439). Bossolono acknowledged that the Complainant believed he followed the rules by reporting the derail to his co-worker (Ed Denney), but he testified that was insufficient as the rules require it be reported to a supervisor. (*Id.*). Regarding the Complainant's locker discipline, Bossolono stated that it does, in fact, matter where an employee lockers, because of the distance of travel between buildings, which requires employees to go outside and expose themselves to weather, which Bossolono believes is an unnecessary risk. (Tr. 440). According to Bossolono, while it is true that there is no specific rule on where an employee lockers, "the issue here was [the Complainant] received supervisory instruction from a general foreman over a period of several weeks and he failed to follow those instructions which is serious." (Tr. 441).

B. Exhibits

1. Joint Exhibits

JX 1 is the Complainant's employee transcript. The transcript shows that the Complainant was hired on February 13, 2006 and fired on June 16, 2010. The transcript also includes the Complainant's disciplinary record, injury record, and training courses.

JX 2 is the Complainant's October 15, 2007, injury report. In the report, the Complainant reported that the injury occurred on October 11, 2007 at 5:15 pm. He described the injury as follows:

> Was dropping 25 track (E) derail when the level stuck so I pulled with some harder pressure when the handle went easy and wrench my back, then right after that I was [illegible] when I put my back in bad position, which left me where I am at now.

The Complainant listed Ed Denney, the electrician, as a witness to the accident. The Complainant also stated that the derail "maybe need some maintenance." The report states that a copy of the report shall be provided to the Respondent's supervisor.

JX 3 is a letter dated October 22, 2009 from Mark Hoffman, Assistant Shop Superintendent for the Respondent, approving the Complainant for injury leave from October 14, 2007 to November 4, 2007.

JX 4 is a notification from Natalie Jones, the Respondent's nurse, that as of October 16, 2007 the Complainant was on work restrictions of no pushing, pulling, or lifting over five pounds, no work above shoulder level, and no bending of lumbar spine.

JX 5 is the Complainant's waiver of formal investigation for the overtime discipline. The Complainant waived a formal investigation on the charge of working twenty-two minutes of overtime without performing any duties on September 25, 2007—a violation of Rule S-28.6 Conduct, Section 4, Dishonest—in exchange for a record suspension of ten days and probation for one year. The Complainant signed the waiver on October 24, 2007.

JX 6 is a notification from Natalie Jones that as of November 1, 2007, the Claimant had no work restrictions. The document was sent to numerous supervisors, including Dennis Bossolono.

JX 7 contains the records pertaining to the Complainant's discipline for allegedly failing to report the defective derail that injured him until three days after the injury (violation of Rule S-28.4). The Complainant was notified of the disciplinary charge and the investigation on October 31, 2007. There is an email from Brallier dated October 14, 2007, in which he stated that the derail "does not seem to be any harder to throw than the other derails. (I checked 23 and 24) It could stand to be lubed but other than that it works fine." (JX 7 at 37). The investigation worksheet states that the reason for the investigation is that the Complainant "failed to report a defective derail or hard to operate derail outside track 25 at the diesel shop." (JX 7 at 33). The investigation transcript is included in the exhibit. The investigation occurred on November 13, 2007. During the investigation, which was conducted by Bryan Gordon, Brallier testified that he did not learn of the defective derail until three days after the incident when he learned the Complainant had been taken out of service due to the injury. (JX 7 at 9). Brallier also testified that typically when an employee encounters a defective derail, the employee should notify the shop planner or the Supervisor. (JX 7 at 11). Brallier stated that he was aware that the Complainant reported the defective derail to Ed Denney. (JX 7 at 16). He testified that Ed Denney used to be a Safety Director, but at the time he was only an electrician. (JX 7 at 17). The Complainant testified that he told Ed Denney—"the safety guy"—about the derail, who he "was always told" was the proper authority. (JX 7 at 23-24). Following the investigation, Gordon found that the Complainant violated Rule S-28.4 and assessed a non-serious offense with a twenty day record suspension and one year of probation from the date of the incident (October 11, 2007).

JX 8 contains the records pertaining to the Complainant's discipline for insubordination and dishonesty when Schakel told him to change lockers. The Complainant was notified on

January 10, 2008, that he was being charged with violating Rule S-28.6 Conduct, Section 4, Dishonest and Rule S-28.13 Reporting and Complying with Instructions. (JX 8 at 40). The investigation was conducted by Bryan Gordon on January 18, 2008. Schakel's testimony at the investigation is summarized above, but essentially, Schakel testified that he had been asking the Complainant to move his locker from the DSF to the diesel shop for a few weeks and that on December 27, 2007, he asked the Complainant if he had changed his locker and the Complainant said yes; however, Schakel found the Complainant still at his DSF locker on January 3, 2008. (JX 8 at 7). Schakel then recommended that the Complainant be disciplined, in an email that night to Bossolono and supervisor Hoffman. (JX 8 at 41). The Complainant's side of the story has been summarized above, but again, essentially the Complainant did not feel it was fair that he had to move his locker. With regard to the conversation on January 3, 2008, the Complainant testified that Schakel had only asked if he had found another locker, not whether he actually moved. (JX 8 at 18). Following the investigation, the Complainant was found to have violated the rules and assessed a Level-S serious offense and a thirty-day record suspension and three years' probation. (JX 8 at 1).

JX 9 contains the records pertaining to the Complainant's discipline for failing to report to work on Sunday, December 16, 2007. The facts of this incident have been fully summarized above, but to reiterate, the Complainant called off of work on December 16, 2007. He spoke to Brallier on the phone and told him he would not be coming in because his back was sore. (JX 9 at 12). Brallier asked him if his back was sore due to the injury and the Complainant said he did not know; Brallier asked him if he needed medical attention, and the Complainant said no. (*Id*.). The Complainant had seven prior absences, and per the Respondent's attendance policy, was on "special handling," meaning he needed permission from a supervisor to be off from work. The Complainant had signed a document on November 7, 2007, acknowledging his seventh absence. (JX 9 at 32). The document stated, "The next unexcused absence that you incur will start the formal progression of discipline per the Mechanical Attendance Policy." (JX 9 at 32). Reppond, the conducting officer of the investigation, provided the Complainant an opportunity to explain his absences, but he declined and testified that he had no explanation. (JX 9 at 17). Although the Complainant believed that Brallier had given him permission to be off, Brallier testified he did not give the Complainant permission; rather, he simply noted that the Complainant would not be coming in. (*Id*.; JX 9 at 22). The Complainant was found to have violated the Respondent's attendance policy and was issued a non-serious offense with a ten day record suspension and one year probation. (JX 9 at 1).

JX 10 is the Complainant's FELA lawsuit pertaining to his October 11, 2007, injury. The lawsuit was filed on August 18, 2009 in the District Court of Wyandotte County, Kansas.

JX 11 contains Bossolono's notes from the September 16 and 21, 2009, meetings with the Complainant in his office regarding the injuries and limitations alleged in the Complainant's FELA lawsuit.

JX 12 contains Brallier's notes regarding finding the damaged smart screen on locomotive 7572 on April 14, 2010. Brallier noted that the screen was discovered by laborer Ruiz, who immediately informed his foreman, Frank Colon. Colon then called Brallier, who

inspected the scene. Brallier then informed Officer Curtis Wagers, who took some pictures. Brallier noted that the screen cost $7,993.71 to replace.

JX 13 contains the pictures of the broken screen. There are six date and time-stamped pictures, showing the broken screen, with a reclined chair in front of it.

JX 14 and 15, respectively, are McCall's and Wood's statements, which are transcribed above.

JX 16 is the notice of investigation to the Complainant for the disciplinary charge of destroying the computer screen and giving a false statement. The notice is dated April 23, 2010. The investigation was scheduled for May 3, 2010. The Complainant was taken out of service pending the investigation. The Complainant signed the notice on April 25, 2010.

JX 17 is a request by the Complainant's union representative, Clintel Betts, to postpone the hearing until May 7, 2010. The request, which was made via email, was sent to Darrin Suttles.

JX 18 is a letter postponing the Complainant's investigation until May 7, 2010.

JX 19 is an Affidavit For Application for Warrant filed with the Wyandotte County District Attorney. The Affidavit was signed by Officer Andrew Paalhar on May 3, 2010, and was filed on May 5, 2010.

JX 20 is a statement by the Complainant's wife, Stephanie Carr, dated May 5, 2010. Mrs. Carr complained about Bossolono's handling of the meeting on September 16, 2009—alleging a HIPPA violation—and stated the Complainant did not file the complaint himself because he did not want to lose his job. Mrs. Carr also states that she believed the Complainant was being retaliated against because he had never been disciplined prior to the injury report, but after the report he was placed under investigation five times, including for the broken screen. Mrs. Carr believed that "this is all harassment regarding his work injury." It is unclear to whom exactly this complaint was lodged.

JX 21 is an Information filed by the Assistant District Attorney of Wyandotte County, Kansas, charging the Complainant with felonious damage to property. The Information was filed on May 5, 2010.

JX 22 is the investigation transcript of the May 7, 2010, investigation into the broken computer screen. Darrin Suttles was the conducting officer. The Complainant was represented by Mike Williams. Brallier testified, consistent with his notes introduced as JX 12. Frank Colon, mechanical foreman, testified that he was informed of the screen by mover Adrian Ruiz on April 14, 2010, at approximately 16:35 (4:35 pm). He then called Brallier to inform him of the incident. (JX 22 at 25-26). Ruiz testified that he noticed the screen when he was in the locomotive for the purpose of moving it. Officer Wagers testified that he was informed about a potential incident of vandalism from the police force's call center in Fort Worth. He then met with Brallier, who told him of the screen in locomotive 7572. (JX 22 at 50). Officer Wagers

testified that based upon his experience investigating crimes of vandalism, it appeared to him that either someone had hit the screen with an item or, due to the seat being reclined and the way in which the screen was shattered, someone had kicked it with their foot. (JX 22 at 51). Wagers received a list of individuals who worked on locomotive 7572 from Brallier. (JX 22 at 55). Vernon Holland, the foreman in charge of the individuals working on locomotives in the DSF on that day, testified that according to his records, the Complainant worked on locomotive 7572 on April 14, 2010. (JX 22 at 59). A labor report for locomotive 7572 was introduced into the record, showing that the Complainant, along with several other individuals, did, in fact, work on the locomotive. (JX 22 at 149-50).

Wood testified at the investigation and read his statement into the record. (JX 22 at 85). He also testified that when he first entered 7572 he did not notice any damage to the screen, but he later went back to the locomotive with the Complainant to take a break because the air conditioning was on in the cab. (JX 22 at 86). He testified they were only in the cab for a few minutes. (*Id*.). Wood further testified that the Complainant sat in the engineer seat and identified the seat from the pictures; shortly after sitting, Wood testified, the Complainant went to lean back in the seat and that is when he heard something break. (JX 22 at 87). Wood testified that he did not look over to see what was broken. (*Id*.). They stayed in the cab three or four minutes longer, and as they were leaving, Wood looked over and saw the damaged screen. (JX 22 at 88). Wood testified that he spoke with McCall about the screen after he found out McCall knew about it. (*Id*.). Wood admitted that prior to giving his official statement, he gave a statement to the police that he knew nothing about the screen. (JX 22 at 90). Williams then asked Wood if the Complainant had seniority over him, Wood said yes, and then Suttles interjected and told Williams to "keep the questions toward, you know, the, uh, incident that occurred on, uh, April 14th the alleged, uh, violation." (JX 22 at 91). Williams asked for "latitude" to explore the issue of seniority, but Suttles responded that the questioning appeared to be getting off track. (JX 22 at 91-92). Williams then asked Wood anyway if he ever told the Complainant he wanted the Complainant's job, and Wood answered yes. (JX 22 at 92). Williams then asked Wood if that was because he wanted to see his son play sports, and Wood responded in general that yes, he would want to spend more time with his family on Saturdays. (*Id*). Again, Suttles interjected and stated the questioning was getting "far away from the matter at hand." (*Id*.). Williams then moved on and asked Wood why he initially told the police he did not know anything; Wood responded that he did not want to see anyone get into trouble. (JX 22 at 93). The Complainant then asked Wood a question: "Did you see me break it?" (JX 22 at 97). Wood answered no. (*Id*.).

McCall testified next, and read his statement into the record. (JX 22 at 100-01). According to McCall, he went to the police with his statement because he was "wrestling morally with having the information that they were wanting to know . . . and felt obligated to provide it." (JX 22 at 104). McCall denied having issues with the Complainant in the past. (JX 22 at 105). Williams then asked McCall if he had any business dealings with the Complainant, and Suttles interjected, telling Williams to confine the questioning to the incident with the screen. (*Id.*). Williams said he was trying to delve into potential issues between McCall and the Complainant, and that if he was not allowed to pursue that line of questioning, he would maintain that they were not being given a fair and impartial hearing. (*Id*.). Suttles told Williams that he must keep his questions "within the scope" of "what we're here for." (JX 22 at 106). Williams then asked McCall about whether he ever had a "snowball incident where you had

some discipline" to which McCall said yes. (JX 22 at 107). No other employees were disciplined. (*Id*.). Suttles then interjected again, stating, "We're here to discuss the incident surrounding, uh, . . ." (*Id*.). Williams objected yet again on the grounds that they were not being allowed a fair and impartial hearing because Suttles was "restricting [their] defense." (*Id.*). At this point, Suttles had no more questions for McCall. (JX 22 at 108).

Paalhar also testified at the investigation. He testified that he interviewed the Complainant, who told him that he was on locomotive 7572 on the day in question but he did not damage the screen. (JX 22 at 112). Paalhar acknowledged that Wood had initially denied knowledge of the incident. (JX 22 at 114).

Finally, the Complainant testified. He was asked if he serviced 7572, and he responded that if it was in the DSF that day he would have serviced it. (JX 22 at 116). He denied, however, taking a break with Wood in the locomotive. (JX 22 at 117). He testified that during the criminal investigation, Officers Paalhar and White told him they had video and boot prints and that his boots were almost an identical match, but the complainant maintained his innocence. (JX 22 at 118). Williams then asked the Complainant directly if he had damaged the screen, and the Complainant said no. (JX 22 at 119). When Williams asked the Complainant if he knew why Wood would say he did, the Complainant responded, "No, maybe, I don't know." (JX 22 at 120). The Complainant told Suttles he did not consider the investigation fair because Williams was not allowed to ask "prudent questions" of McCall. (JX 22 at 127).

Williams gave a closing statement in which he continued to protest the manner in which the investigation was handled, particularly their inability to ask Wood about his desire for the Complainant's job so he could watch his son play sports on Saturdays and McCall about business dealings with the Complainant. (JX 22 at 130). At the end of the investigation, Suttles asked for the record if Williams could "advise of anything that was not covered." (JX 22 at 133). Williams responded that "our questioning was not allowed of Mr. Wood and Mr. McCall and . . . for us to develop a proper defense for [the Complainant]." (JX 22 at 134).

JX 23 contains emails between Reppond and Bossolono in which Reppond asks Bossolono, on behalf of Williams, if the Complainant resigned, whether they could drop the criminal charges. Bossolono replied after getting input from the legal department that "there is no way to stop the process now that the warrant has been signed and executed."

JX 24 is a letter from Robert C. Graham, Director of the Respondent's Human Resources department, to the Complainant dated May 12, 2010, apparently in response to the Complainant's complaints in a phone call on May 5, 2010 regarding alleged inappropriate comments of "Resource Protection Officers," as well as alleged inappropriate conduct by Bossolono and Reppond during the September 2009 meetings. Graham responded, "I indicated because of your lawsuit regarding a personal injury I would not be responding to any inquiries regarding this matter and you replied "I understand." Graham also referred to a call by Mrs. Carr to a hotline. According to Graham, "The information Mr. Bossolono shared during his meetings in questions was appropriate considering concerns of your ability to safely perform the job duties associated with the Laborer position." Graham concluded, "Since your injury, all employment

decisions that involved you receiving discipline have been based upon your violation of specific rules and not because of you filing a personal injury report."

JX 25 is the dismissal letter dated June 15, 2010. The letter, signed by John Reppond, informs the Complainant that it had been determined he violated the following rules: Rule S-1.2.8 Reporting; Rule S-28.2.7 Furnishing Information; Rule S—28.23 Clean Property; and Rule S-28.6 Conduct, Section 2 Negligent, Section 4, Dishonest. The letter also states that "[i]n assessing discipline, consideration was given to your personnel record and the discipline assessed is in accordance with the BNSF Policy for Employee Performance and Accountability (PEPA)."

JX 26 contains handwritten notes regarding a union grievance on the Complainant's termination.

JX 27 is the Respondent's submission to the Public Law Board on the Complainant's grievance regarding his termination. The submission is signed by Wendell Bill, the Respondent's General Director of Labor Relations.

JX 28 is the Complainant's union's submission to the Public Law Board. The brief is signed by Jim Larreau, General Chairman of the National Conference of Firemen and Oilers. The submission contains the transcript of the Complainant's criminal trial on August 16, 2011 in the Wyandotte County, Kansas District Court. (JX 28 at 29-63). David Wood testified at the criminal trial. Particularly relevant portions of his testimony are as follows:

> Q. And what were you guys [Wood and the Complainant] doing in the locomotive?
> A. Ah, we were taking a break.
> . . .
> Q. Okay. Um, did - - was anybody else with you other than Shaun?
> A. No.
> . . .
> Q. Okay. When you were first in there, did you notice if the computer screen in that locomotive was broken or was it not broken?
> A. I didn't pay attention. I don't know.
> . . .
> Q. Is there something that obstructs your view of the driver's chair?
> A. Yeah.
> Q. And what's that?
> A. The control stand.
> . . .
> Q. Okay. And while you were sitting in that chair, where was [the Complainant]?
> A. Sitting in the chair that's . . .
> Q. The driver's chair?
> A. Yes.
> . . .

Q. Okay. Um, do you remember hearing anything or noticing anything while you were sitting in the chair?
A. Ah, I heard him cuss and say mother fucker and then I heard something break.
. . .
Q. Okay. After you heard something break, did he say anything?
A. Ah, that he told me he broke the screen, and then left.
. . .
Q. Okay. What were you doing when he left?
A. I was actually on my phone and I got up a couple minutes later and then I left.
. . .
Q. Okay. A couple minutes, and when you got up, did you, um, observe the damage on the screen?
A. As I walked out of the cab I saw it.
. . .
Q. . . . What did you first tell the BNSF police officer?
A. That I didn't know anything about it, I didn't know what happened.
Q. Okay. And why did you say that?
A. Because I didn't want to see anybody get in trouble.
. . .
Q. What caused you to give a second statement?
A. Because they were telling us they had a camera and they knew who did it, and I did not want to lose my job over it.
. . .
Q. Okay. Did you report your second statement, or did you give your second statement in order to get [the Complainant] in trouble?
A. No.
Q. Did you report your second statement in order for [the Complainant] to get fired so you could have his days off.
A. No, I did not.

(JX 28 at 38-42). The Complainant also took the stand at his criminal trial. Particularly relevant portions of his testimony are as follows:

Q. There were some allegations that you broke this computer screen.
A. Yes, there were.
Q. Did you break the screen?
A. No, I did not.
. . .
Q. Okay. Now, do you deny being in an engine around 3:30 on April 14th?
A. No, I could have been in a locomotive.
Q. Would you be sitting down in the chair?
A. Sometimes we do sit in the chair, yes.
. . .
Q. Did anything unusual happen while you were in the engine?
A. No.
Q. Did you drop anything?

A. Ah, I dropped a cell phone?
Q. What'd you say?
A. I said mother fucker.

(JX 28 at 57-58).

Following the trial, Judge Burns found the Complainant not guilty. (JX 28 at 63). He reasoned that Wood's credibility "is really the key in this case," and that Wood had previously given a false statement to the authorities and "may or may not have a motive to make this up based on wanting certain days off." (JX 28 at 62). Judge Burns commented that the evidence "may not be sufficient to even establish the defendant's fault if this were a civil case." (JX 28 at 63). Judge Burns dismissed the matter on September 6, 2011. (JX 28 at 64).

JX 29 is the Public Law Board's decision in favor of the Respondent. The Board found no violation of the Complainant's due process rights. (JX 29 at 5). The Board upheld the Complainant's termination as based upon substantial evidence, and the Complainant's grievance was denied. (JX 29 at 6).

JX 30 is a portion of the collective bargaining agreement between the Respondent and the Complainant's union (National Conference of Firemen and Oilers), containing the rules regarding grievances and investigations.

JX 31 is the Respondent's Policy for Employee Performance and Accountability referred to by Reppond in the dismissal letter and explained by Heenan during his testimony.

JX 32 contains the Respondent's Mechanical Safety Rules.

JX 33 is a portion of the Respondent's Code of Conduct. The Code states that employees may report violations of law, the Code itself, and BNSF policy without fear of retaliation.

JX 34 contains information regarding the Respondent's hotline. The document states that the hotline "is one way employees, contractors, vendors and other stakeholders can report concerns regarding potentially unethical, fraudulent, or illegal behavior as related to the company's Code of Conduct and policies." In bold letters, the document states that the Respondent has a no-retaliation policy for good faith use of the hotline.

JX 35 is the Complainant's complaint to OSHA in this matter. The complaint is dated October 14, 2010. The Complainant alleges that "Mr. Bossolono's actions in 2009 were the beginning of a deliberate campaign to discriminate, harass, and intimidate me because I reported an injury and an unsafe condition."

JX 36 is the Respondent's response to the Complainant's complaint denying the Complainant's allegations.

JX 37 is a memo of the OSHA investigator assigned to the Complaint's complaint.

JX 38 is the Complainant's statement to the OSHA investigator.

JX 39 contains OSHA's findings on the complaint. The findings state, "OSHA's investigations found that Complainant did not establish a prima facie violation of retaliation under FRSA. A preponderance of the evidence indicates that even if Complainant did engage in protected activity, the protected activity was not a contributing factor in the adverse actions. Respondent has put forth and established legitimate, non-retaliatory reasons for its decision to discipline Complainant."

JX 40 is the Complainant's request for a hearing before an administrative law judge.

JX 41 is the Complainant's answers and objections to the Respondent's first set of discovery requests.

JX 42 is the Complainant's answers and objections to the Respondent's first set of requests for production.

JX 43 is the Declaration of Karen McKee, Manager of Corporate Policies, Compliance, and Records for the Respondent. McKee attached nine copies of dismissal letters for past employees of the Respondent who had been found responsible for various rules violations, including dishonesty.

JX 44 is the Complainant's amended FELA lawsuit, filed in the Wyandotte County, Kansas, Circuit Court. The Complainant amended his FELA lawsuit to include claims for malicious prosecution and abuse of process, alleging that in filing the criminal charges, the Respondent "acted with malice and willfully committed the act without just cause or excuse" and "attempted to commandeer the criminal proceeding as a mere bargaining chip to coerce plaintiff into dismissing the personal injury claims in this Petition."

JX 45 is a lawsuit filed by the Complainant and his wife in the Wyandotte County, Kansas, Circuit Court against the Respondent on July 26, 2012, alleging malicious prosecution, abuse of process, and loss of consortium.

JX 46 contains the Complainant's earnings records while employed by the Respondent.

2. The Complainant's Exhibits

CX 2 is a page from the Respondent's answers and objections to the Complainant's first set of interrogatories.

CX 4 is the list Reppond read from during his testimony regarding individuals who had not been issued discipline following an investigation.

CX 5 is the Decision and Order of Judge Solomon in *Christopher J. Cain v. BNSF*.

CX 6 is the Order of Remand of Judge Julie A. Robinson, United States District Court for the District of Kansas, remanding the Complainant's malicious prosecution and abuse of process claims to state court. The Respondent had removed the Complainant's case to federal court, arguing that non-diverse defendants were fraudulently joined by the Complainant in an effort to defeat federal jurisdiction. Judge Robinson essentially found that the Respondent failed to meet its "onerous" burden of showing that the non-diverse defendants—Bossolono, Brallier, and another supervisor, Stockman—had been fraudulently joined, because there was a "reasonable basis in the alleged facts and applicable law" to show malicious prosecution and abuse of process if the Complainant could show that Bossolono, Brallier, and Stockman procured the criminal prosecution by coercing fraudulent accusations from Wood and McCall.

3. The Respondent's Exhibits

RX 1 contains records from the Complainant's discipline for the overtime incident. In a letter from Mark Hoffman to the Complainant dated October 17, 2007, Hoffman informs the Complainant that an investigation has been scheduled for Tuesday, October 23, 2007, to determine his responsibility for working twenty-two minutes of overtime without performing any duties on September 25, 2007. On October 18, 2007, a letter from Bryan Gordon informs the Complainant that the Respondent is requesting a postponement of the investigation until Wednesday, October 24, 2007.

RX 2 contains the Complainant's tax documents for the years 2010 and 2011.

RX 3 is a job application the Complainant completed in in September 2011 for the City Olathe, Kansas.

RX 4 contains records from the Complainant's selection for a machinist apprentice position with the Respondent. On August 19, 2008, Reppond informed the Complainant that he had been selected to be interviewed for the position on August 25, 2008.

RX 5 is the transcript of the hearing in the matter of *Christopher Cain v. BNSF*. The hearing was held on June 20, 2012.

RX 6 is the decision of Public Law Board Chairman and Neutral Member, Robert L. Hicks, on the Complainant's appeal of his discipline for failing to properly report the defective derail. Chairman Hicks denied the Complainant's appeal, finding that the Complainant did, in fact, fail to report the stiff derail to anyone other than his co-worker, "who he mistook for an official," and that this failure "prevented anyone from taking action to alleviate the problem and possibly save others from suffering damage to themselves."

RX 7 is Chairman Hicks's decision regarding the Complainant's appeal of his discipline for failing to move his locker and dishonesty. Chairman Hicks denied the Complainant's appeal, finding, "For his failure to comply with instructions and being less than truthful with his supervisor, the thirty day record suspension and three year probation is relatively light."

RX 8 is Chairman Hicks's decision on the Complainant's appeal of his discipline for excessive absences. Chairman Hicks found that there were no special circumstances justifying the Complainant's absence, and noted that if "the Claimant does not correct his absentee problems he will reach the last step."

RX 9 is the Argentine LMIT Safety Action Plan.

RX 10 is the Respondent's Petition for Review of Judge Solomon's Decision in *Christopher Cain v. BNSF*.

APPLICABLE LAW

The FRSA generally prohibits a covered railroad carrier from retaliating against an employee for engaging in whistleblowing activities relating to railroad safety or security. Specifically, the FRSA states:

> **§ 20109. Employee Protections**
>
> (a) IN GENERAL.—A railroad carrier engaged in interstate or foreign commerce . . . 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 . . .
>
> (1) to provide information . . . regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security . . .;
>
> (2) to refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security;
>
> (3) to file a complaint . . . related to the enforcement of this part or, as applicable to railroad safety or security, chapter 51 or 57 of this title, or to testify in that proceeding;
>
> (4) to notify . . . the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee;
>
> (5) to cooperate with a safety or security investigation . . .;
>
> (6) to furnish information . . . as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with railroad transportation; or
>
> (7) to accurately report hours of duty. . . .

"The intent of this provision is to ensure that employees can report their concerns without fear of possible retaliation or discrimination from employers."[3]

The FRSA incorporates the legal burdens of proof set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21").[4] Specifically, the Act provides that actions for retaliation under the Act "shall be governed by the rules and procedures

[3] H.R. Rep. No. 110-259 at 348 (2007) (Conf. Rep.).
[4] 49 U.S.C. § 42121(b).

set forth in section 42121(b), including: . . . the legal burdens of proof set forth in [that section]."[5] Section 42121(b), as applied to the FRSA, provides that a violation may be found "if the complainant demonstrates that any behavior described in paragraphs [(1) through (7) of subsection (a)] was a contributing factor in the unfavorable personnel action."[6] If the complainant can make that showing, the employer may avoid liability by demonstrating "by clear and convincing evidence that [it] would have taken the same unfavorable personnel action in the absence of that behavior."[7]

In *DeFrancesco v. Union Railroad Company*, the Administrative Review Board laid out the elements of an FRSA whistleblower claim as follows:

> To prevail, a FRSA complainant must establish by a preponderance of the evidence that: (a) he engaged in 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. If a complainant meets his burden of proof, the employer may avoid liability only if proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of a complainant's protected behavior.[8]

In *Araujo v. New Jersey Transit Rail Operations*, the Third Circuit Court of Appeals recently described the FRSA whistleblower scheme as a "two-part burden-shifting test"[9] The *Araujo* court held that the AIR 21 burden-shifting framework applicable to FRSA whistleblower claims is distinct from, and more complainant-friendly than, the *McDonnell-Douglas* burden-shifting framework applicable to other anti-retaliation statutes such as Title VII.[10]

Here, there is no dispute that the Respondent is a railroad carrier engaged in interstate commerce or that the Complainant was an employee of the Respondent, and thus there is no dispute as to jurisdiction or the applicability of the FRSA to this claim.[11]

A. The Complainant's Burden

As noted, the Complainant has the initial burden to prove, by a preponderance of the evidence, that his protected activity was a contributing factor in the unfavorable personnel action. If the Complainant cannot prove these three elements, then his claim fails and the burden does not shift to the Respondent to prove by clear and convincing evidence that it would have taken the unfavorable personnel action regardless of the protected activity.

1. Protected Activity

[5] 49 U.S.C. § 20109(d)(2)(A)(i).
[6] 49 U.S.C. § 42121(b)(2)(B)(iii).
[7] 49 U.S.C. § 42141(b)(2)(B)(iv).
[8] ARB No. 10-114, ALJ No. 2009-FRS-9, slip op. at 5 (ARB Feb. 29, 2012) (footnotes omitted).
[9] No. 12-2148, slip op. at 11 (3d. Cir. Feb. 19, 2013).
[10] *Id*. at 16.
[11] *See* p. 13 of the Respondent's Proposed Findings of Fact and Conclusions of Law.

The FRSA protects seven specific activities, one of which is notifying the carrier of a work-related personal injury.[12] Here, the record clearly demonstrates that on October 15, 2007 the Complainant notified the Respondent of a work-related injury that occurred on October 11, 2007. (JX 2). There is also no dispute that the Respondent's management (*i.e.*, Bossolono, Reppond, Brallier, and others) knew of the Complainant's injury report.[13] Accordingly, I find that the Complainant has established that he engaged in protected activity by a preponderance of the evidence.

2. Unfavorable Personnel Action

The FRSA provides that an employer may not "discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole in or in part," to the employee's protected activity.[14] The regulations implementing the FRSA provide that "discrimination" due to protected activity includes, but is not limited to, "intimidating, threatening, restraining, coercing, blacklisting, or disciplining."[15] Here, the Complainant was terminated. There is no dispute that termination constitutes an unfavorable personnel action,[16] thus I find that this element of the Complainant's claim is established.

3. Contributing Factor

The final element that the Complainant must establish is that his injury report was a contributing factor in his termination. A "contributing factor" is defined as "any factor which, alone or in connection with other facts, tends to affect in any way the outcome of the decision."[17] A complainant may establish the contributing factor element by direct or circumstantial evidence.[18] Direct evidence is "smoking gun evidence that conclusively links the protected activity and the [unfavorable personnel action] and does not rely upon inference."[19] If a complainant does not have direct evidence, the complainant "must proceed indirectly, or inferentially, by proving by a preponderance of the evidence that retaliation was the true reason for terminating [the complainant's] employment."[20] Indirect 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

[12] 49 U.S.C. § 20109(a)(1)-(7).
[13] *See Bechtel v. Competitive Technologies, Inc*., No. 11-4918-ag, slip op. at 7 n.5 (2d Cir. March 5, 2013) (stating that although knowledge of the protected activity is not expressly stated in § 42121(b)(2)(B)(iii), "it is implicit that before certain conduct can be a 'contributing factor' in an employer's decision, the employer must at least suspect that the employee has engaged in that conduct.").
[14] 49 U.S.C. § 20109(a).
[15] 29 C.F.R. § 1982.102(b)(1).
[16] *See Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 8 n. 2 (ARB Jan. 31, 2011) ("Because termination is materially adverse on its face, a determination as to whether Domino's' discharge of Williams was materially adverse or whether it could dissuade a reasonable worker from engaging in protected activity is unnecessary.").
[17] *DeFrancesco*, ARB No. 10-114, slip op. at 6.
[18] *Id.* at 6-7.
[19] *Williams*, ARB No. 09-092, slip op. at 6.
[20] *Id*.

change in the employer's attitude toward the complainant after he or she engages in protected activity."[21]

In *Araujo*, the Third Circuit explained that the contributing factor test "is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action. . . ."[22] Moreover, in proving that his or her protected activity was a contributing factor in an unfavorable personnel action, a whistleblower complainant "need not demonstrate the existence of a retaliatory motive"[23] on the part of the decisionmaker.

Here, I fail to see how the Complainant's injury report in 2007 contributed to his termination in 2010. The Complainant spends a great deal of time and effort arguing that he was not responsible for breaking the computer screen, but that is not the issue in this case. Even if the Complainant did not break the screen, that does not mean the injury report contributed to his termination. And even if the Complainant did break the screen, the Respondent would have acted unlawfully if it had considered his injury report as well in making the decision to fire him. In other words, in this case it matters not whether the Complainant actually destroyed the computer screen; all that matters is if the Complainant's injury report was a contributing factor in the Respondent's decision to terminate him. "It is not sufficient for [the Complainant] to establish that the decision to terminate his employment was not 'just, or fair, or sensible . . . rather he must show that the explanation is a phony reason.'"[24]

This is not to say that the circumstances surrounding the Complainant's termination are irrelevant. If, for example, the evidence so clearly exonerated the Complainant that the Respondent's stated reason for his termination was utterly incredible, then that could provide a basis for drawing an inference of retaliation. However, although I am not convinced that the Complainant destroyed the computer screen based upon the facts elicited in this case, and I refrain from making a finding one way or the other, I cannot say that the Respondent was wholly unjustified in reaching that conclusion. The evidence clearly demonstrates that the Complainant was, in fact, on board locomotive 7572 on the day the screen was found vandalized. Two co-workers gave sworn statements that implicated him as the culprit. One co-worker, Wood, gave eye-witness testimony during the investigation that he was present with the Complainant when the Complainant broke the screen. (JX 22 at 87). Wood stated that he was sitting in the cab behind the Complainant, situated in a manner which prohibited him from seeing the screen, when he heard the Complainant lean back and yell an expletive shortly before hearing something

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[21] *DeFrancesco*, ARB No. 10-114, slip op. at 7.

[22] No. 12-2148, slip op. at 15 (3rd. Cir. Feb. 19, 2013) (quoting *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (quoting 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20)).

[23] *Id*. (citing *Marano*, 2 F. 3d at 1141).

[24] *Stojicevic v. Arizona-American Water*, ARB No. 05-081, ALJ No. 2004-SOX-073, slip op. at 10 (ARB Oct. 30, 2007) (SOX) (quoting *Gale v. Ocean Imaging*, ARB No. 98-143, ALJ No. 1997-ERA-038, slip op. at 10 (ARB July 31, 2002) (citing *Kahn v. U.S. Sec'y of Labor*, 14 F.3d 342, 349 (7th Cir. 1994)); *see also Ransom v. CSC Consulting, Inc*., 217 F.3d 467, 471 (7th Cir. 2000), ("[t]his court does not sit as a super-personnel department and will not second-guess an employer's decisions"); *Skouby v. The Prudential Ins. Co*., 130 F.3d 794, 795 (7th Cir. 1997) (same); *Bienkowski v. American Airlines, Inc*., 851 F.2d 1503, 1507-1508 (5th Cir. 1988) (discrimination statute "was not intended to be a vehicle for judicial second-guessing of employment decisions, nor was it intended to transform the courts into personnel managers"; anti-discrimination statutes cannot protect employees "from erroneous or even arbitrary personnel decisions, but only from decisions which are unlawfully motivated").

break. While Wood admits that he did not actually see the Complainant break the screen (because of the way the seats were situated in the cab) (JX 22 at 92; Tr. 189), he testified that the Complainant told him he broke the screen, and that he looked over and saw the damage as he was exiting the locomotive. (Tr. 189).

The Complainant presents multiple theories for why Wood lied. At the investigation, the Complainant argued that Wood was one man under the Complainant in seniority and that he wanted the Complainant's days off. (JX 22 at 91, 92). However, during the hearing in this case, the Complainant argued that Wood lied because McCall blackmailed him with information about Wood's alleged marital infidelity, McCall threatened to disclose if Wood did not come forward and implicate the Complainant. (Tr. 79, 183, 186). This theory was not presented during the investigation, and Wood denied it during the hearing in this case. (Tr. 183). Although there is no dispute that Wood initially told the officers that he did not know who broke the screen, Wood's story has been consistent throughout all three hearings on the matter (the investigation, the criminal trial, and this case), and I found him to be a credible witness. Wood's explanation for the inconsistent statement—that he initially did not want to see anyone get in trouble, but eventually did not want to get in trouble himself (Tr. 180, 190)—is believable and understandable, and, despite his best efforts, the Complainant has done nothing to discredit Wood's story. That the Respondent's police officers used "normal police tactics"—*i.e.*, exaggerating the evidence they had—to induce Wood to step forward with information is not evidence of retaliation; in fact, it actually bolsters his story. If Wood was under the impression the officers had videotape or photographic evidence (as he indicated during the criminal trial), why would he admit he was in the cab when the screen was broken if he was not actually there?

McCall did not testify in this case, so I am unable to assess his credibility. However, I do note that the Complainant's theory for why McCall lied changed from the investigation to this hearing. At the investigation, the Complainant suggested that McCall was upset about some business dealing he had with the Complainant, as well as some vague references to a snowball incident (JX 22 at 105, 107). At the hearing in this case, however, the Complainant suggested it was McCall, not Wood, who had the seniority-based motive. (Tr. 75, 140). Unlike Wood, McCall had not previously given an inconsistent statement. Furthermore, like Wood's statement, McCall's statement that the Complainant told him he broke the screen while leaning back in the chair is corroborated by the photographs of the interior of the locomotive, which do, in fact, show the chair in a reclined position. (JX 13).

In sum, I cannot say that the Respondent was wholly unjustified in relying on McCall's and Wood's statements and testimony that the Complainant was responsible for breaking the screen. The Complainant suggests that their statements are irreconcilable (that is, Wood's statement is that the Complainant broke the screen intentionally, whereas McCall's statement is that Wood accidentally broke the screen) (Tr. 238), which makes their statements unreliable and suggests a retaliatory motive on the Respondent's part. I disagree that the statements are necessarily irreconcilable and inconsistent. Wood never stated that the Complainant broke the screen on purpose, either in his statement or during the investigation. This is just one more reason I cannot find that the Respondent's reliance on Wood's and McCall's statements was so unjustified that they must have been motivated by retaliatory animus.

The Complainant also maintains that the investigation into the broken screen was biased, pointing out that the conducting officer, Suttles, repeatedly interjected and cut off Williams when he questioned Wood and McCall about their alleged motives to lie. I agree that Suttles should have allowed the Complainant to develop that evidence. While Suttles's failure to do so perhaps says something about his qualifications as conducting officer, it is not evidence of retaliation, because it is undisputed that Suttles was unaware of the Complainant's injury report. (Tr. 319). Suttles could not have conducted a biased investigation if he was unaware of the Complainant's injury report.

I am, however, troubled by the Respondent's disciplining the Complainant for working twenty-two minutes of overtime without performing any duties on September 25, 2007. There is no doubt that such conduct would subject an employee to discipline under the Respondent's policies; however, what troubles me is the timing of the discipline. More specifically, the evidence establishes that the Complainant allegedly committed this violation on September 25, 2007 and that Bossolono called the Complainant into his office to confront him about the violation shortly afterward (two to three weeks before the Complainant's injury report on October 15, 2007). (Tr. 96). However, the Complainant was not called for an investigation for the alleged infraction until October 17, 2007, two days after his injury report and three-plus weeks after the alleged violation and the meeting with Bossolono. (RX 1). It is unclear why the Respondent would wait three weeks to initiate disciplinary proceedings against the Complainant, and it is suspicious that the notice of investigation came down only two days after the Complainant's injury report. Nevertheless, a substantial amount of time (approximately 2.5 years) elapsed between this discipline and the Complainant's ultimate termination. And in the interim, the Complainant was disciplined for multiple instances of misconduct, which, for the reasons explained below, I do not find retaliatory. Moreover, the Complainant is not alleging that the overtime discipline itself is an actionable unfavorable personnel action, nor could he, as it is well outside of the FRSA's 180 day statute of limitations.[25]

The Complainant also maintains that his being disciplined for failing to report the defective derail was retaliatory. (Tr. 61). This discipline was in close temporal proximity to his injury report (the notice of investigation was dated October 31, 2007, approximately two weeks after the injury report), but that is explained by the fact that the circumstances giving rise to the discipline and the injury report are one and the same. The Respondent's policy of requiring employees to report defective equipment is not unlawful, as the Respondent has a legitimate interest in a safe workplace; therefore, it would not necessarily be retaliatory to discipline an injured employee because that employee failed to properly report the defective equipment that injured the employee. The Complainant protested that he did report the injury to his co-worker, who at one point was a safety director but was no longer in that position at the time of the injury; however, the Respondent has a policy requiring employees to report defective equipment to the Planner, General Foreman, or a Supervisor. (JX 7 at 15, 17; JX 32). That Ed Denney did not immediately tell Brallier about the derail and Brallier did not know about it until three days after the Complainant's injury (JX 7 at 7-8) illustrates the wisdom of this rule; in other words, the Complainant's failure to properly report the defective derail left a potentially dangerous situation unaddressed for three days and exposed other employees to the same injury. In any event, I am not in a position to question the Respondent's internal disciplinary policies, provided they are not

[25] 49 U.S.C. § 20109(d)(2)(A)(ii).

per se retaliatory (which this rule is not), and the Complainant has not produced any evidence showing that this rule is selectively or disproportionately applied to employees who report injuries. Therefore, I do not find that the discipline for failing to report the defective derail suggests retaliation.

The next event that the Complainant alleges was retaliatory was the discipline for failing to follow instructions about moving his locker and then dishonesty when Schakel asked him if he had moved. I disagree, as I find nothing in the record tying this discipline to his injury report. To the contrary, the record more than substantiates the Respondent's decision to discipline the Complainant in this instance. Schakel had been asking the Complainant to move his locker from the DSF for at least two weeks when on December 27, 2007, he asked the Complainant point blank whether he had found a new locker. (JX 8 at 7, 41). The Complainant responded that he had, indeed, found a new locker. (JX 8 at 10). Then approximately one week later Schakel found the Complainant at the locker in DSF. (*Id.*). Schakel considered this insubordination and dishonesty, and I agree. I reject the Complainant's argument that he was being unfairly "singled out." Schakel testified that there was good reason for asking him to move: "common sense" dictates that an employee's locker should be located where the employee works, because an employee should not expose themselves to bad weather unnecessarily. (JX 8 at 9). And while the Complainant maintains that there were other employees who lockered at the DSF and did not work there, he did not know whether they had also been asked to move their locker. (Tr. 108). I find the Complainant's explanation—that he only answered "yes" to whether he had found a new locker, not whether he had actually moved to a new locker (JX 8 at 18-19)—disingenuous. Considering that Schakel had been telling the Complainant to move his locker for weeks, when he asked the Complainant if he had found a new locker, it was implied that he was also asking if the Complainant had moved into the new locker. In sum, I do not find that the locker discipline is evidence of retaliation.

Next, there is the excessive absenteeism discipline. Once again, I find nothing in the record to suggest that the Complainant's injury report contributed to this discipline. There is no dispute that the Complainant was on "special handling" (meaning that he needed permission from a supervisor to be absent from work, because he had seven previous unexcused absences) when he called off on December 16, 2007. The Complainant signed a form dated November 7, 2007, unequivocally warning him that due to his seven prior unexcused absences, "The next unexcused occurrence that you incur will start the formal progression of discipline per the Mechanical Attendance Policy." (JX 9 at 32). At the investigation, the Complainant had no explanation for his seven prior absences. (JX 9 at 17). There is also no dispute that the Complainant called off of work an eighth time on December 16, 2007. (JX 9 at 8, 34). The Complainant's foreman, Brallier, testified that he did not give the Complainant permission to be off; rather, he just noted that the Complainant would not be coming in. (JX 9 at 11). In other words, there was no discussion of permission one way or the other. (JX 9 at 22). Although the Complainant believed he had permission to be off, he agreed that under the attendance policy, it was possible for an absence to be acknowledged by a supervisor and still count against the employee in terms of compliance with the attendance policy. (Tr. 113-14). Reppond testified that the discipline issued to the Complainant for absenteeism was "right on line" with what other employees with similar attendance issues received. (Tr. 233). I find nothing in the record to suggest the Complainant's injury report contributed to the Respondent's

disciplining him for excessive absenteeism. Therefore, I do not find that the discipline for excessive absenteeism is evidence of retaliation.

The next allegedly retaliatory incidents were the September 2009 meetings with Bossolono. It is worth pointing out that in his complaint, the Complainant alleged that this is when the retaliation started: "Mr. Bossolono's actions in 2009 were *the beginning* of a deliberate campaign to discriminate, harass, and intimidate me because I reported an injury and an unsafe condition." (JX 35) (emphasis added). The Complainant is alleging that these meetings are evidence of retaliation because (a) Bossolono asked the Complainant about his FELA lawsuit, which is directly related to the injury he reported; and (b) Bossolono's demeanor was "accusatory and intimidating, which made [the Complainant] feel threatened."[26] Certainly, "antagonism or hostility" toward a complainant's protected activity may provide circumstantial evidence of retaliation.[27] The Complainant's testimony during the hearing regarding the first meeting on Thursday, September 16, 2009, is devoid of any specific allegations of hostility. According to the Complainant, Bossolono had circled a paragraph from the Complainant's lawsuit (JX 11 at 2) and asked the Complainant to explain if the alleged injuries and limitations affected his ability to work. (Tr. 71). The Complainant testified that he was scared because he was afraid he was going to be pulled out of service. (*Id.*). It is not clear if the Complainant considered the circling of the paragraph threatening, or just the atmosphere and circumstances of the meeting, although I do note that the Complainant's union representative, Clintel Betts, was present during the meeting. After Bossolono asked the Complainant if the limitations alleged in the lawsuit affected his ability to work, Betts spoke up and suggested that the Complainant be allowed to consult his attorneys and come back on Saturday. (Tr. 72). When the Complainant returned the following Monday, September 21, 2009, the Complainant testified that Bossolono was upset that he did not return the previous Saturday as agreed. (Tr. 73). According to the Complainant, he told Bossolono his lawsuit was a legal matter and that if he had any further questions, he would have to contact his attorney. (*Id*.). The Complainant testified Bossolono then accused him of having been "coached" and angrily ordered him and Betts out of his office. (*Id*.). Twenty-five minutes later, the Complainant testified, Bossolono emerged from his office in a better mood and told the Complainant that the Respondent's policy is to compensate its employees for work injuries and that the Complainant was free to return to work. (Tr. 73-74).

For his part, Bossolono denied scheduling the meeting to harass the Complainant, and he testified that he had similar meetings with other employees at the Argentine LMIT, not all of whom had filed FELA lawsuits. (Tr. 423-24). He denied raising his voice or losing his temper, and characterized his demeanor as "calm and professional." (Tr. 426). According to Bossolono, his motive for scheduling the meeting was to determine if the Complainant was physically able to work. (Tr. 423). Reppond, who was also present during the meetings, testified that Bossolono never raised his voice, lost control of his temper, or behaved unprofessionally. (Tr. 226). He also testified that Bossolono told the Complainant he was not interested in talking about the lawsuit; he just wanted to ensure the Complainant was safe. (Tr. 225).

Given the conflicting testimony about the September 2009 meetings, I find that there is insufficient evidence of hostility to warrant an inference of retaliation. The September 2009

[26] The Complainant's Post-Hearing Brief at p. 3.
[27] *DeFrancesco*, ARB No. 10-114, slip op. at 7.

meetings were almost two years after the Complainant filed his injury report. Thus, I find no basis in temporal proximity to tie the injury report to any purported harassment during the meetings. In any event, I credit Bossolono's and Reppond's testimony that Bossolono was not intimidating and harassing over the Complainant's testimony to the contrary. The Complainant's testimony was somewhat unclear as to whether Bossolono was angry during the second meeting about the FELA lawsuit or the Complainant's failure to return on Saturday as promised. While it is understandable that the Complainant felt threatened being asked about his lawsuit in a supervisor's office, the Respondent has the right to ensure that its employees are free from limitations that pose risks to themselves or other employees in the workplace. Of course, an employer is not allowed to harass or intimidate employees who inform them of their injuries,[28] but for the reasons already stated, I find insufficient evidence of harassment in this case. In sum, I decline to draw an inference of retaliation based upon Bossolono's meetings with the Complainant in September 2009.

In conclusion, I find that the Complainant has failed to meet his burden of proving that his injury report was a contributing factor in his termination. The Complainant has no direct evidence of contribution, and I have found the circumstantial evidence insufficient to warrant an inference of retaliation. The period between the Complainant's October 2007 injury report and his June 2010 termination is too remote to permit an inference of retaliation based on temporal proximity.[29] And for the reasons stated above, I do not find that the Complainant's disciplinary history is evidence of retaliation; to the contrary, I find that the disciplinary incidents were justified.

Because the Complainant has failed to prove that his injury report was a contributing factor in his termination by a preponderance of the evidence, the burden does not shift to the Respondent to prove by clear and convincing evidence that it would have terminated the Complainant regardless of his protected activity. Nevertheless, I note that had the burden shifted, I would find that the Respondent has proven clearly and convincingly that it would have terminated the Complainant for the broken computer screen. Clear and convincing evidence "denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain."[30] The clear and convincing standard is "more rigorous" than the preponderance of the evidence standard.[31] As I explained above, while I decline to make a finding that the Complainant is responsible for breaking the computer screen, there is enough evidence in the record for the Respondent to have made that finding. The Complainant's acquittal in the criminal trial only means the State failed to prove *beyond a reasonable doubt* that the Complainant *intentionally* destroyed the computer screen. And in addition to Suttles's, Bossolono's, and Reppond's determinations that the Complainant destroyed the screen, there have been two separate and independent determinations finding substantial evidence to find the Complainant responsible. First, the Respondent's Director of Employee Performance, Joe Heenan, reviewed the transcript of the investigation and the exhibits attached thereto and found

[28] *Williams v. American Airlines, Inc*., ARB No. 09-018, ALJ No. 2007-AIR-4, slip op. at 11-12 (ARB Dec. 29, 2010) (AIR).
[29] *See Conroy v. Vilsack*, __ F.3d __, No. 11-4091, 2013 WL 491546 at * 16 (10th Cir. Feb. 11, 2013) (finding that a two year period is "too temporally remote to support an inference of causation.") (quoting *Antonio v. Sygma Network, Inc*., 458 F.3d 1177, 1182 (10th Cir.2006)).
[30] *DeFrancesco*, ARB No. 10-114, slip op. at 8.
[31] *Id*.

substantial evidence to find the Complainant destroyed company property and gave a false statement. (Tr. 353). Additionally, the Public Law Board denied the Complainant's grievance on his termination, finding substantial evidence to support the Respondent's finding. (JX 29).

There is no doubt that, under the Respondent's disciplinary policy, destroying $8,000 worth of company property and then lying about it are sufficient to warrant discharge. (*See* JX 31 at 8). Under the policy, gross dishonesty and rules violations resulting in extensive damage to company property are considered dismissible rules violations. (*Id.;* Tr. 360-62). And even if the computer screen incident is not considered a stand-alone dismissible offense, it would at the very least be a serious infraction, and 2 serious infractions within 36 months will subject an employee to discharge under the policy. (JX 31 at 4). Reppond and Bossolono both testified that the Complainant's injury report was not a factor in his termination, and Bossolono provided examples of prior employees who had also been discharged for dishonesty. (Tr. 217, 416-18; JX 43). Therefore, although the Complainant has not met his burden of proving his injury report was a contributing factor in his termination, even if he had, I would find that the Respondent demonstrated, clearly and convincingly, that it would have terminated the Complainant in the absence of any protected activity.

Conclusion

In conclusion, there is no dispute that the Complainant engaged in protected activity as defined by the FRSA when he notified the Respondent of his work-related injury and that he suffered an unfavorable personnel action when he was terminated. However, the Complainant has failed to prove that his injury report was a contributing factor in his termination, and even if he had done so, the Respondent has proven by clear and convincing evidence that it would have terminated the Complainant regardless of his injury report. Therefore, the Complainant's FRSA retaliation claim must be denied.

ORDER

It is HEREBY ORDERED that the claim of the Complainant, Shaun M. Carr, against the Respondent, Burlington National & Santa Fe Railway Company, for violation of Section 20109 of the Federal Rail Safety Act, is **DENIED**.

Digitally signed by JOSEPH KANE
DN: CN=JOSEPH KANE,
OU=ADMINISTRATIVE LAW JUDGE,
O=Office of Administrative Law Judges,
L=Cincinnati, S=OH, C=US
Location: Cincinnati OH

JOSEPH E. KANE
Administrative Law Judge

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

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

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

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

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

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

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

Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. §§ 1982.110(a) and (b).