

U.S. Department of Labor

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Issue Date: 28 April 2014

Case No.: 2012-FRS-00058

In the Matter of

JOSEPH W. CIESIELSKI
Complainant

v.

NORFOLK SOUTHERN CORPORATION
Respondent

Appearances:

JAMES J. MCELDEREW, Esq.
TODD M. MOSSER, Esq.
For the Complainant

ANDREW J. ROLFES, Esq.
ROBERT S. HAWKINS, Esq.
For the Respondent

Before: ADELE HIGGINS ODEGARD
Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

This proceeding involves a complaint filed under the “whistleblower” employee protection provisions of the Federal Railroad Safety Act (FRSA or the “Act”), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53. Implementing regulations were published on August 31, 2010. See “Procedures for the Handling of Retaliation Complaints Under the

National Transit Systems Security Act and the Federal Railroad Safety Act,” 75 Fed. Reg. 53,522 (Aug. 31, 2010), to be codified at 29 C.F.R. Part 1982.¹

Procedural History

On October 20, 2011, the Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor, alleging that the Respondent, his former employer, retaliated against him in violation of the FRSA on June 1, 2011, by notifying him that his employment with the Respondent had been terminated effective May 28, 2011. JX G.^{2,3} The Complainant stated that he was asked to testify at a hearing regarding allegations that Conductor Michael DiMauro “held up train H5A several times...deliberately to obtain overtime.” Id. The Complainant characterized the Respondent’s allegations against Mr. DiMauro as involving violations of the “Hours of Service Regulations.” Id. Specifically, the Complainant asserted that he “was threatened by Norfolk Southern Management, that if he did not testify consistent with management’s wishes, he would be fired.” Id.

The Secretary of Labor, acting through the OSHA Regional Administrator, investigated the complaint. The Secretary issued findings on June 25, 2012. JX H. The Regional Administrator found the following: the Complainant’s complaint was timely; the parties are subject to the Act; the disciplinary hearing was not a proceeding defined under 49 U.S.C. 20109(a)(1); the Complainant does not allege that he made any complaints in regard to railroad safety or security; and the Complainant did not engaged in protected activity as defined in the Act. Accordingly, the Regional Administrator dismissed the Complainant’s complaint.

On August 3, 2012, through Counsel, the Respondent timely filed an objection to the Secretary’s findings and requested a formal hearing before an administrative law judge. Subsequently, the case was forwarded to the Office of Administrative Law Judges (OALJ) and assigned to me. On January 3, 2013, the Respondent filed a Motion for Summary Decision. The Complainant filed a response to the Respondent’s Motion on January 30, 2013. I issued an Order dated March 12, 2013, granting in part and denying in part, the Respondent’s Motion for Summary Decision. I found that there were issues of material fact regarding whether the Complainant engaged in protected activity pursuant to 49 U.S.C. § 20109(a)(1) and whether the Complainant’s alleged protected activity was a contributing factor in his discharge. Order dated March 12, 2013 at 8, 10. In addition, I found that based on the facts of record, no rationale trier of fact could find that the Complainant’s testimony at the May 2011 disciplinary hearing constituted protected activity pursuant to §§ 20109(a)(2) and 20109(a)(7) of the Act. Id. at 8-9. On April 11, 2013, the Respondent submitted a Renewed Motion for Summary Decision, which

¹ Unless otherwise noted, all references to regulations are to Title 29, Code of Federal Regulations (C.F.R.). References to the implementing regulations will cite to the applicable provision in Part 1982, rather than to the Federal Register.

² Complainant’s complaint was dated October 18, 2011 but was stamped “received” at OSHA on October 20, 2011.

³ The following abbreviations are used in this Decision: “JX” refers to Joint Exhibits; “CX” refers to Complainant’s Exhibits; “RX” refers to Respondent’s Exhibits; and “T.” refers to the transcript of the June 19, 2013 and July 1, 2013 hearing sessions.

it subsequently withdrew after the parties stipulated to the dismissal of the Complainant's other suit, pending in federal district court.

The first session of hearing was held before me in Cherry Hill, New Jersey on June 19, 2013. A second day of testimony took place on July 1, 2013. During the hearing, the parties had full opportunity to present evidence and argument. The decision that follows is based upon an analysis of the record, the arguments of the parties, and the applicable law. I have considered the entire record, including the parties' briefs,⁴ the documentary evidence, and the hearing testimony.

Applicable Law

In pertinent part, the Act provides for relief against railroad carriers who "discharge, demote, suspend, reprimand, or in any other way discriminate against an employee," if such action is due "in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security...." 49 U.S.C. § 20109(a)(1); see also § 1982.102(b)(1).

The Act provides that the burdens of proof set forth at 49 U.S.C. § 42121(b) apply.⁵ 49 U.S.C. § 20109(d)(2). Under the governing regulation, a complaint must be dismissed unless the complainant is able to establish the following elements by a preponderance of the evidence:

- 1) The complainant engaged in protected activity, as defined by the Act;
- 2) The complainant suffered an adverse action from the employer; and
- 3) The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in receiving the adverse action.

49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1982.104(e)(2). See also Hamilton v. CSX Transp., Inc., ARB No. 12-022, ALJ No. 2010-FRS-025, slip op. at 3 n.3 (ARB Apr. 30, 2013).

Even if the complainant establishes all of the elements, the complaint will be dismissed if the employer demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the complainant's protected activity. § 1982.104(e)(4).

Under the Act, a prevailing employee is "entitled to all relief necessary to make the employee whole." 49 U.S.C. § 20109(e)(1). Specific elements of damages listed in the Act include compensatory damages, including compensation for special damages sustained as a

⁴ I issued an Order on October 29, 2013 granting Respondent's unopposed request to strike portions of the Complainant's post-hearing brief. The stricken references will not be considered herein.

⁵ This is the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21).

result of the discrimination, such as litigation costs. 49 U.S.C. § 20109(e)(2). Punitive damages in an amount up to \$250,000 may also be awarded. § 20109(e)(3).

The Parties' Contentions

As set forth in their post-hearing briefs, the parties' positions are as follows:

Complainant

- Complainant engaged in conduct protected by the Act when he testified at the May 2011 disciplinary hearing. Complainant's Brief at 13.
- Complainant reasonably believed that sleeping on duty, a subject discussed at the disciplinary hearing, was prohibited by federal rules. Complainant's Brief at 16.
- Complainant's discharge was an adverse action as defined in the Act. Complainant's Brief at 33.
- The temporal proximity between the Complainant's disciplinary hearing testimony and his termination, demonstrates that the alleged protected activity was a contributing factor in the Complainant's termination. Complainant's Brief at 20.
- The reasons for the Complainant's termination asserted by Respondent are pretext. Complainant's Brief at 20-27.
- Respondent failed to show any evidence that it would have terminated the Complainant in the absence of the alleged protected activity. Complainant's Brief at 29-30.
- Complainant seeks back pay, compensatory damages and also the statutory maximum amount of punitive damages. Complainant's Brief at 32-33.

Respondent

- The Complainant failed to establish the necessary elements of his whistleblower retaliation claim. Specifically:
 - The Complainant failed to show that he engaged in protected activity under the Act. Respondent's Brief at 33-42.
 - Complainant failed to show that his alleged protected activity contributed to his termination. Respondent's Brief at 44-56.
- Respondent has proven by clear and convincing evidence that it would have taken the same action against Complainant regardless of the alleged protected activity. Respondent's Brief at 56.
- In the event that a violation is found, punitive damages are not appropriate. Respondent's Brief at 57-59.

Issues

The following issues are presented for adjudication:

- Whether Complainant engaged in protected activity under § 20109(a)(1) of the FRSA;

- Whether the rejection of the Complainant's application for employment is an adverse action under the Act;⁶
- Whether there is a connection between Complainant's protected activity and the rejection of the Complainant's application for employment;
- Whether the Complainant's application for employment would have been rejected in absence of protected activity; and
- In the event the Complainant establishes the Respondent violated the Act, the appropriate remedies.

Stipulated Facts

At the hearing, I admitted the parties' joint stipulations of facts as Joint Exhibit 1. T. at 7. The parties' stipulations are as follows:

- 1) Respondent is a railroad carrier subject to the employee protection provisions of the Act.
- 2) Complainant was employed by the Respondent as a conductor trainee (CT) beginning on January 17, 2011. Upon completion of classroom training in Georgia, the Complainant began field training on February 4, 2011 in Abrams yard in King of Prussia, PA. The Complainant also continued to attend classroom training in Harrisburg, PA.
- 3) As a conductor trainee, the Complainant was not a member of either labor union which represents employees of the Respondent.
- 4) On May 12, 2011, management personnel, including Road Foreman of Engines Timothy McCorkle, Trainmaster Jason Bruskotter and Management Trainee Scott Rossman inspected train H5A. At the time of the inspection, Engineer D.M. Piston and Conductor M.J. DiMauro were assigned to H5A. Management observed Engineer Piston sleeping on duty and Conductor DiMauro speaking on a personal call, away from the engines.
- 5) As a result of the May 12, 2011 inspection, Mr. Bruskotter and Mr. McCorkle further investigated the activities of the train crew assigned to the H5A on various other dates in early May 2011. The investigation revealed two dates, May 5 and May 6, 2011, on which the Complainant worked with the H5A crew.
- 6) On May 26, 2011, the Complainant was called to testify as a witness at a formal investigation into the conduct of Engineer Piston and Conductor DiMauro. The charges were as follows:
 - Conduct unbecoming an employee when [they] unnecessarily delayed [their] assignment in an attempt to gain overtime when [the] train sat idle and [they] performed no service between approximately 1 ½ and 2 hours without a valid reason at South Philadelphia Yard on May 4, 5, 6, 9, 10, 11 and 12, 2011 while serving as the crew members on H5AH404, H5AH405, H5AH406, H5AH409, H5AH410, H5AH411 and H5AH412.

⁶ The Complainant was in a trainee status in May 2011; the alleged adverse action was the Respondent's rejection of the Complainant's application for permanent employment, which effectively was a termination of employment.

- In addition, Conductor DiMauro is charged with making false and misleading statements to a Carrier Officer concerning a matter under investigation; and Engineer Piston is charged with sleeping while on duty at approximately 8:15 AM on May 12, 2011.
 - These incidents occurred in the vicinity of South Philadelphia Yard while assigned as crew members on train H5A.
- 7) On May 28, 2011, Dennis Murton emailed Respondent's EEO department and requested authorization to release the Complainant from the conductor trainee program, which would result in the termination of the Complainant's employment.
 - 8) On June 1, 2011, Mr. Murton notified the Complainant that he was being released from the conductor trainee program.
 - 9) The Complainant received a letter dated June 1, 2011 from Patrick Whitehead, Division Superintendent for the Harrisburg Division, that his application for employment was rejected effective May 28, 2011, thereby formally terminating his employment as a conductor trainee as of that date.
 - 10) The Complainant received a Certificate of Group Health Plan Coverage dated June 7, 2011, which indicated that his last day covered as an active employee was May 27, 2011.
 - 11) On October 18, 2011, the Complainant filed a whistleblower complaint under the FRSA with OSHA. On June 25, 2012, OSHA issued its Secretary's Findings dismissing the Complainant's complaint. On or about August 3, 2012, the Complainant filed his Notice of Objections/Request for Hearing initiating the instant proceeding.

I find the evidence of record supports these stipulations.

Documents Submitted by the Parties

The parties jointly submitted the following Exhibits:

- The Complainant's Employee Abbreviated Profile. Joint Exhibit (JX) A.
- The May 26, 2011 Investigation Transcript. JX B.
- Exhibits from the May 26, 2011 Investigation. JX C.
- Multiple conductor trainee performance evaluations. JX D.
- Letter dated 06/01/2011 from Patrick Whitehead to the Complainant. JX E.
- WageWorks COBRA notice and elections forms sent to the Complainant dated 06/07/2011. JX F.
- October 18, 2011 complaint filed with OSHA. JX G.
- June 25, 2012 Letter from OSHA Acting Regional Administrator. JX H.
- August 3, 2012 Notice of Objections/Request for Hearing. JX I.
- The parties' pre-hearing stipulation of facts. JX 1.
- The statement of John Darrah. JX 2.

The Complainant submitted the following Exhibits:

- Complainant's Employee Status Changes. Complainant's Exhibit (CX) 1.

- Letter from Pam Wetzel dated 11/2/2010 regarding employment. CX 2.
- Harrisburg Division conductor trainee Orientation Forms with handwritten note. CX 3.
- Email notifications sent by the Complainant to Mr. Murton regarding the Complainant's quiz and test results. CX 4.
- Email from Timothy McCorkle to Jack Darrah dated 05/19/2011, 11:56 p.m. CX 5.
- Email from Mr. McCorkle to Dennis Murton dated 05/20/2011, 8:36 a.m. CX 6.
- Email from Mr. Darrah to Mr. McCorkle dated 05/20/2011, 6:30 a.m. CX 7.
- Email from Mr. McCorkle to Mr. Darrah dated 05/20/2011, 8:11 a.m. CX 8.
- Email from Mr. Darrah to Mr. McCorkle dated 5/20/2011, 8:19 a.m. CX 9.
- Email from Mr. McCorkle to Mr. Murton dated 5/20/2011, 10:43 a.m. CX 10.
- Email from Mr. McCorkle to Mr. Murton dated 05/21/2011, 7:57 a.m. CX 11.
- Email from the Complainant to Mr. Murton dated 05/22/2011, 3:35 p.m. CX 12.
- Email chain from Mr. Murton to EEO dated 05/28/2011, 10:37 a.m. CX 13.
- Email from Michele Malski to Mr. Murton dated 05/31/2011, 11:16 a.m. CX 14.
- Email from Mr. Murton to Ms. Wetzel, et. al., dated 05/31/2011, 1:57 p.m. CX 15
- Email chain between Mr. Murton, Ms. Malski and Ms. Wetzel dated 06/01/2011, 10:38 p.m. CX 16.
- Email from Ms. Wetzel to Ms. Malski dated 06/02/2011, 4:53 p.m. CX 16.
- Undated letter from Robert Durkin to Mark Shane. CX 17.
- Norfolk Southern Evaluation Form dated 05/26/2011 evaluating the Complainant. CX 18.
- Letter dated 06/01/2011 from Patrick Whitehead to the Complainant. CX 19.
- Transcript of Mr. McCorkle's 11/19/2012 deposition. CX 20.
- Transcript of Mr. Murton's 11/28/2012 deposition. CX 21.
- Transcript of the Complainant's 11/19/2012 deposition.⁷ CX 22.
- Transcript of Mr. Jason Bruskotter's trial deposition dated 06/12/2013. CX 23.
- Respondent's responses to the Complainant's first set of interrogatories. CX 24.
- The Complainant's 2009, 2010, 2011 and 2012 tax returns. CX 25-28.
- Emails showing the Complainant's job searching activity. CX 29-46.
- Norfolk Southern Operating Rules. CX 47.
- Excerpt from NORAC Operating Rules 9th Ed. CX 48.

The Respondent submitted the following Exhibits:

- Norfolk Southern ACT Training Schedule. Respondent's Exhibit (RX) 1.
- Email notifications sent by the Complainant to Mr. Murton regarding the Complainant's quiz and test results. RX 2-13.
- The Complainant's "Blood Rule" Quiz answers. RX 14.
- The Complainant's "Blood Rule Quiz for CT" answers. RX 15.
- The Complainant's "Do You Know How to Use Your Timetable" quiz answers. RX 16.
- The Complainant's "Annual Book of Rules" exam record. RX 17.

⁷ At the hearing, Complainant's Exhibits 20, 21 and 22 were admitted solely for impeachment purposes.

- Abrams Yard schematic. RX 18.
- Philadelphia Area Railroads map. RX 19.
- Complainant's CT Monthly Evaluation Form dated March 2011 completed by Mr. Murton. RX 20.
- Complainant's CT Monthly Evaluation Form dated April 17, 2011 completed by Mr. Shane. RX 21.
- Undated letter from Robert Durkin to Mark Shane. RX 22.
- Norfolk Southern Evaluation Form dated 05/26/2011 evaluating the Complainant. RX 23.
- Email chain from Mr. Murton to EEO dated 05/28/2011, 10:37 a.m. RX 24.⁸
- Email from Mr. Murton to Ms. Wetzel, et. al., dated 05/31/2011, 1:57 p.m. RX 25.
- Email chain between Mr. Murton and Mr. Bruskotter dated 06/01/2011, 10:17 a.m. RX 26.
- Table: Train H5A Idle Times- South Philadelphia Yard. RX 27
- Norfolk Southern Locomotive photograph. RX 28.
- May 5, 2011 Crew Information Sheet. RX 29.
- Email chain between Mr. Darrah and Mr. McCorkle dated 05/20/2011, 8:19 a.m. RX 30.
- Email chain from Mr. McCorkle to Mr. Murton dated 05/20/2011, 8:36 a.m. RX 31.
- Email chain from Mr. McCorkle to Mr. Murton dated 05/20/2011, 10:43 a.m. RX 32.
- Email chain from Mr. McCorkle to Mr. Murton dated 05/21/2011, 7:57 a.m. RX 33.
- Letter from Mr. Bruskotter to Mr. Piston and Mr. DiMaulo dated May 20, 2011. RX 34.
- Excerpt from NORAC Operating Rules 9th Ed. RX 35.
- Norfolk Southern Safety and General Conduct Rule 26. RX 36.
- McCorkle phone call to the Complainant audio file and transcription. RX 37, 50.
- Progress Report for conductor trainee dated 05/10/2011 completed by Mr. Durkin regarding the Complainant's performance. RX 38.
- Progress Report for conductor trainee dated 05/24/2011 completed by Mr. Durkin regarding the Complainant's performance. RX 39.
- May 24, 2011 Crew Information Sheet. RX 40.
- Excerpts from Norfolk Southern Safety and General Conduct Rules. RX 41.
- Norfolk Southern Thoroughbred Code of Ethics. RX 42.
- Norfolk Southern Internal Control Plan. RX 43.
- Respondent's First Set of Interrogatories Directed to the Complainant and Complainant's responses. RX 44-45.
- Transcript of the Complainant's 11/19/2012 deposition. RX 46.
- Complainant's Weekly Duty Log for the week of May 23, 2011. RX 47.
- CSX Transportation Operating Rules and Signal Aspects and Indications effective January 1, 2010. RX 48.
- Respondent's amended responses to the Complainant's first set of interrogatories. RX 49.

⁸ At the hearing, the Complainant's counsel expressed concerns regarding the attachment referenced in RX 24. After discussion between the parties, the Respondent agreed to produce a complete copy of the email with the attachment. T. at 215. By letter dated June 28, 2013, the Respondent submitted the requested documents.

SUMMARY OF THE TESTIMONIAL EVIDENCE

The Complainant

The Complainant testified under oath. He stated that prior to his employment with Norfolk Southern, he performed electrical work. The Complainant stated that after his termination from Norfolk Southern, he was unemployed for a little over 15 months starting on June 1, 2011. The Complainant began working for SEPTA on August 27, 2012 and currently works for SEPTA in the Control and Signals division. T. at 430-33.

The Complainant stated that he applied to work for the Respondent around the middle of October 2010. After interviewing and testing, the Complainant attended training in Georgia in January 2011. While in Georgia, he was tested on the “blood rules,” HAZMAT rules, and matters such as “how to get off a train, dismount and mount correctly, how to hang on the grab irons [and] how to use your [train] light.” The Complainant described the “blood rules” as “pretty serious” and that “you could be killed or severely injured if you didn’t follow the blood rules.” T. at 433-36.

The Complainant stated that GR-26 and 27 are rules pertaining to sleeping on duty. He stated that the Norfolk Southern rules and the Northeast Operating Rules Advisory Committee (NORAC) rules prohibit sleeping on duty. He commented that based on his training, the Federal Rail Administration (FRA) enforces federal laws and oversees all the U.S. Class I railroads. The Complainant also stated that the FRA “oversee[s] all U.S. Class A Railroads and they make sure the FRA rules, NORAC rules and all operation rules are being complied with.” He noted that he learned about the Code of Federal Regulations in Georgia and stated that he believed that he was working under federal law when working on the railroad. The Complainant mentioned that the federal government oversees all Class A railroads.⁹ T. at 436-37.

Upon returning from Georgia in February 2011, the Complainant was assigned to the Abrams yard in King of Prussia. He performed different jobs in the yard and shadowed various conductors. He also stated that he went to school on Saturdays and would review books and take quizzes. He stated that he took approximately ten or fifteen quizzes per week. The Complainant explained that he would follow different rules when he went onto the property of other railroads. He stated that sleeping on duty was prohibited by all railroads for safety reasons and possibly to protect against loss of cargo. T. at 437-40.

The Complainant’s training continued in March and April 2011. The Complainant described his performance on the weekly quizzes in March 2011 as above average. During that time, the Complainant received written evaluations from all of the conductors he shadowed. The Complainant stated that he was present when the conductors completed the evaluation forms. The Complainant was required to turn in the evaluation forms to Mr. Murton every week. He

⁹ The Complainant referred to Class A and Class I railroads interchangeably during his testimony. Federal law and regulations classify railroads as Class I, Class II and Class III. 49 U.S.C. § 20102; 49 C.F.R. pt. 1201 §1-1. In addition, Mr. Murton repeatedly testified that the FRA governs Class I railroads. T. at 83-84, 118.

recalled that he worked with approximately five or six conductors per week. He stated that in the months of March and April, he was not told that he was not progressing properly or that he was a danger to himself and those around him or that he was moving too slowly and would not progress. The Complainant did not remember any monthly evaluations. The Complainant stated that Mark Shane mentored all of the conductor trainees and would assist with training. The Complainant was not aware that Mr. Shane wrote an evaluation of the Complainant in April 2011 and stated that he never worked on an engine with Mr. Shane. T. at 440-45

The Complainant explained that on May 5, 2011, he worked with Engineer Piston and Conductor DiMaulo on the H5A train. He stated that the train was stopped on that date by a person he did not know in an unmarked vehicle. He observed Conductor DiMaulo speaking to the person in the car, but could not hear the conversation because he was approximately 200 feet away. The Complainant stated that he did not speak to Conductor DiMaulo about what had transpired. He expected that there would be an investigation as a result of the situation. He stated that he also worked on the H5A train on May 6.¹⁰ He explained that he did not observe either Mr. DiMaulo or Mr. Piston sleeping or any other problems on either date. T. at 445-48.

The Complainant stated that on May 16, he was approached by Mr. Bruskotter and asked if he observed Mr. DiMaulo or Mr. Piston sleeping or smoking on the train, stealing time or delaying the train. He stated that Mr. McCorkle approached him approximately 15 minutes later with similar questions. The Complainant anticipated that there would be an investigation against Mr. DiMaulo and Mr. Piston. He described Mr. McCorkle and Mr. Bruskotter's demeanor as professional. He commented that Mr. McCorkle and Mr. Bruskotter spoke to him again on May 19. The Complainant stated that Mr. McCorkle aggressively questioned him about the H5A train, asking "if the gentlemen were sleeping on the train, were they stealing time, delaying the train in any way, smoking on the train." He stated that he replied negatively. The Complainant stated that he was asked if the train was stopped, and that he replied affirmatively. He also stated that he was asked if Mr. DiMaulo spoke with Trainmaster Darrah¹¹ about safety vests and goggles. The Complainant responded that he did not know because he did not know the identity of the person in the vehicle. He stated that he felt concerned and threatened when Mr. McCorkle responded that he did not believe the Complainant's answer, and commented that he thought that the Complainant was lying and that "it's not over." T. at 448-51.

The Complaint recalled that during the Saturday training which followed his conversation with Mr. McCorkle, Mr. Murton asked him about the H5A train. When the Complainant replied that there was nothing going on with the H5A train, Mr. Murton stated that "based on your answers is based on whether you are going to have a job or not." Mr. Murton asked the Complainant to send him an email with his account of what happened and the Complainant complied. He stated that when he wrote the email, he thought that he was going to be fired. In addition, the Complainant believed that Mr. McCorkle and Mr. Murton wanted him to lie for them in order to fire Mr. DiMaulo and Mr. Piston. He stated that he received a call on May 25 and spoke to Frances, the crew dispatcher, and Mr. McCorkle. The Complainant testified that he was going to tell the dispatcher that they wanted him to lie in court, but he was cut off. The

¹⁰ Unless otherwise noted, all of the events described herein took place in 2011.

¹¹ This name was spelled Darryl in the transcript. T. at 451.

Complainant stated that when he worked with Mr. Durkin on May 24, he had his flashlight and switch keys. He also refuted some of the statements made in Mr. Durkin's letter (RX 22). He stated that he did not remember meeting with Mr. Shane on May 27 or receiving a handwritten evaluation on that date. T. at 451-71.

The Complainant testified that he believed that sleeping on duty "is a blood rule, a violation of federal law." He stated that he thought that if he did not lie at the hearing, he would be fired. He stated that Mr. McCorkle's request that the Complainant bring his work equipment to the hearing informed his opinion regarding the threat of termination. The Complainant also discussed his job search efforts after his termination.¹² He stated that he constantly looked for work and applied for a lot of jobs. He stated that his period of unemployment was stressful and depressing and that he worried about bills and losing his home. The Complainant noted that at the time, his wife was working part-time, 20 hours per week, excluding summers. He described that Christmas was depressing, because he could not afford presents for his wife or son. T. at 471-80.

On cross-examination, the Complainant testified that he did not believe that the charge investigated at the hearing regarding "conduct unbecoming based on unnecessarily delaying an assignment in an attempt to gain overtime" was a violation of federal law. When asked if the charge "making false and misleading statements to a carrier officer concerning a matter under investigation" involved federal law, the Complainant responded that he did not know. When questioned further, the Complainant testified that he did not believe that making a false and misleading statement involved a violation of federal law. The Complainant reiterated his belief that "sleeping [on duty] is definitely a violation of federal law." The Complainant stated that he never observed Mr. Piston sleeping or doing anything that he believed was a violation of federal law or regulation. The Complainant testified that he never told anyone in Norfolk Southern management about any conduct which he believed violated federal law. T. at 480-90.

The Complainant offered additional testimony about the May 25 phone call. He agreed that the dispatcher was trying to be helpful to him at the end of the call. He also stated that he could not remember whether Mr. McCorkle told him what the charges at the hearing would be. The Complainant testified that the only thing that he knew was that he "was going to be a company witness." He also noted that he thought the hearing was about safety. He did not interpret Mr. McCorkle's statements on the phone call as a threat, but he did construe former statements made by Mr. McCorkle as threats. The Complainant stated that he could not recall if he knew, prior to the hearing, that Mr. Piston had been observed sleeping on duty. The Complainant acknowledged that he was not asked any questions about sleeping on duty at the hearing by Mr. Keller or Mr. Brennan. T. at 490-509.

After the Respondent's counsel referred the Complainant to Mr. Bruskotter's testimony regarding the violated rules, the Complainant agreed with counsel that he did not know of any other rules that Mr. DiMaulo or Mr. Piston were charged with violating. He agreed that the

¹² The Respondent stipulated that the Complainant made a reasonable effort to find new employment. T. at 477. I allowed the Complainant's testimony, as it related to the Complainant's request for punitive damages. Id.

NORAC rules and Norfolk Southern Safety and General Conduct Rules were not issued by the federal government. The Complainant stated that he was trained on federal law and rules while working for the Respondent. He stated that he believed that one of the FRA rules prohibited sleeping on all Class I railroads, but could not cite to a specific provision. T. at 512-28.

The Complainant testified that he had never had any negative interactions with Mr. McCorkle prior to May 16. He stated that he informed Mr. McCorkle that Mr. DiMaulo got off the train to talk to someone in the South Philadelphia yard and that the train stopped. The Complainant testified that he did not ask Mr. DiMaulo about his interaction with Trainmaster Darrah, because Mr. DiMaulo was not personable. The Complainant testified that on May 5, he did not think that there would be an investigation; he stated that he did not anticipate an investigation until he was questioned about Mr. DiMaulo and Mr. Piston. T. at 539-52.

He stated that he was threatened by Mr. McCorkle on May 19. He described that Mr. McCorkle “called [him] a liar, in [his] face; he was very aggressive.” The Complainant stated that Mr. McCorkle informed him that Mr. Piston and Mr. DiMaulo were going to be investigated, but was not told about a hearing during his May 19 conversation with Mr. McCorkle. He testified that he had never been part of a formal hearing investigation on the railroad before May 26. The Complainant stated that “because Mr. McCorkle didn’t like my answers he was going to use me to get those two fired.” When asked how Mr. McCorkle was going to use him, the Complainant replied “by intimidation.” He acknowledged that Mr. McCorkle never asked him to lie, but that he “could tell he [Mr. McCorkle] didn’t like the answers that I was telling him.” He stated that he knew that there would be an investigation and that lawyers would be involved. T. at 562-66.

The Complainant reiterated that he never received negative feedback about his job performance. The Complainant acknowledged that he received criticisms regarding needing to study signals and requiring maps. He stated that he was supposed to receive maps from Mr. Shane, but never did. He denied that he misaligned a shove move while working with Mr. Durkin. The Complainant noted that he did not remember being sent home by Mr. Durkin early on the morning of May 25. He stated that he was not aware during his May 24 to May 25 shift that he was going to be called to testify as a witness on May 26. The Complainant also testified that he does not remember meeting with Mr. Shane at the Abrams yard on May 27. T. at 570-81.

The Complainant testified that at his job with SEPTA, he earns more than he did as a conductor trainee. He stated that he never sought counseling for emotional distress, either during his unemployment or now that he has medical coverage. He stated that he was bothered significantly by these events and that he still gets depressed. On redirect, the Complainant stated that he thought that Mr. McCorkle wanted him to lie about Mr. DiMaulo and Mr. Piston sleeping on trains in court. He stated that he felt intimidated when Mr. McCorkle informed him that he should bring his equipment to the hearing. Upon my questioning, the Complainant testified that he did not speak to Mr. Murton between the time when he sent the email to Mr. Murton on May 22 and the date of the May 26 hearing. T. at 581-89.

Robert Durkin

Mr. Durkin testified under oath on behalf of the Complainant and the Respondent. He stated that he is presently employed by the Respondent as a train conductor. Mr. Durkin explained that one of his job responsibilities is training conductor trainees (CTs). He stated that he worked with the Complainant on two occasions, May 10 and May 25. At the end of the May 10 shift, Mr. Durkin filled out a performance evaluation for the Complainant and then he and the Complainant signed the form. He opined that the evaluation forms “don’t mean anything.” He stated that “half the time they’re not even turned in,” especially when they include negative comments about a CT. He stated that if he has problems with a CT, he will speak to the trainer about it. He reviewed the Complainant’s May 25 evaluation and acknowledged that he filled out the evaluation himself. Mr. Durkin also stated that on May 25, he wrote a letter to Mr. Shane regarding the Complainant’s performance. He stated that he did not know that the letter was going to be used as a basis for firing the Complainant. Dr. Durkin also testified that no one asked him to write the letter. When asked why certain information contained in the letter was not included in the performance evaluation form, Mr. Durkin replied that “Mr. Shane is in charge of training, so my concerns I took right to him.” He stated that he was concerned that the Complainant was not fit for continued employment because he was a week from graduating and he “had no idea where he was or what to do.” Mr. Durkin agreed that honesty is important on the railroad because people can be killed. He also provided more information about the Complainant’s failure to properly align the trains for a shove move. T. at 39-52.

Mr. Durkin stated that he has been a conductor for five and a half years. When he works with CTs, he quizzes them the entire time. He stated that he spends little time filling out the trainee evaluation forms. He explained that on the May 24 to May 25 shift, the Complainant showed up without keys or a flashlight. Mr. Durkin testified that he lent the Complainant a flashlight, so that he could work. He reiterated that the Complainant did not properly align the cars on that date. Mr. Durkin also testified that he quizzed the Complainant regarding the rules pertaining to shove moves and taking on and off hand brakes, and did not receive any correct answers. He stated that the Complainant also demonstrated a lack of focus and that he observed the Complainant not paying attention. Mr. Durkin testified that at the time he wrote the memo to Mr. Shane, he did not know anything about the Complainant’s participation in the investigatory hearing. He stated that he sent the Complainant home early. Mr. Durkin also stated that other than the Complainant, he has never sent a CT home early. Mr. Durkin acknowledged that he was disciplined for safety violations on three occasions. He also testified that he did not include negative comments on the May 25 trainee evaluation because he did not want the Complainant to be “tortured” at Saturday training and he was concerned that if he recommended the Complainant’s termination, the Complainant would not have turned in the evaluation form. He stated that he felt strongly about the Complainant’s performance, due to safety concerns. T. at 52-74.

Dennis Murton

Mr. Murton testified under oath for the Complainant and the Respondent. He stated that he currently works for the Respondent as a train dispatcher. At the time of the Complainant’s employment with the Respondent, Mr. Murton was a division training coordinator. He provided

background regarding the Respondent's conductor training program. Mr. Murton stated that in Georgia, the trainees learn about railroad rules including the NORAC rules and an overview of the FRA. He stated that some of the "blood rules" are overseen by the FRA, such as derailments, hand brakes and shove rules. Mr. Murton stated that he could not answer whether sleeping on duty is one of those rules, but stated that it is against the NORAC rules. He testified that to his knowledge, the Complainant did not have any issues with the Georgia training. Mr. Murton acknowledged that there were essentially no problems with the Complainant from the beginning of his work at the Abrams yard in February through the second week of May 2011. T. at 76-90.

Mr. Murton stated that he put limited weight on the evaluation forms turned in by the CTs and thinks that they are often overinflated. He noted that he would hope that conductors would discuss serious problems on the evaluation forms, but stated that in reality, it is not always the case. He stated that the limitations of the evaluations are the reason why monthly officer evaluations are also performed. He mentioned that the officers get their information by looking at tests or quizzes, and interviewing and observing the CT. He stated that it is his practice to share the comments with the CT, but the employee does not need to sign off on the evaluation. Mr. Murton testified that prior to May 19, 2011, the Complainant's performance was average, maybe a little bit below average. He stated that the Complainant's promotion would have been questionable, had nothing else taken place. He commented that "the integrity issue with Mr. McCorkle . . . coupled with Mr. Durkin's concerns" tipped the balance in favor of rejection of the Complainant's application. T. at 90-101.

He stated that the Complainant was fired for "being untruthful or possibly covering up." He stated that when an officer on the scene has already investigated, he does not investigate a second time. He does not independently recall asking the Complainant to write a statement, but acknowledged that he must have done so based on the documentation. Mr. Murton stated that he asked the Complainant to do so because he wanted to "be fair and look at everything." He stated that he did not ascertain whether the Complainant was actually in a position to hear the conversation between Mr. DiMaulo and Mr. Darrah. He stated that he fired the Complainant "for inconsistent statements that lacked the honest evaluation between the two." He continued that "we had two company officers who get paid to be the police, if you will, of the railroad, and both of them were in unity with trying to figure out what was going on." Mr. Murton reiterated that he is not an investigating officer; instead, the investigating officer brings him facts, he evaluates them and makes a determination. T. at 124-30.

Mr. Murton explained that he would not have known that the Complainant was not at his assignment on May 26. He stated that he was aware that there was an issue with the crew on a particular train and that Mr. McCorkle was investigating Mr. DiMaulo and Mr. Piston, but that he was not involved in that process. He filled out the Complainant's May 2011 officer monthly evaluation with Mr. Shane. He acknowledged that the evaluation was completed prior to May 28 at 10:35 a.m., because it was attached to an email to the EEO department at that time. He stated that he does not have any documentation regarding the Complainant's lack of switch keys or lantern, and suggested that Mr. Shane could answer that question. Mr. Murton stated that he never rode the train with the Complainant; instead, the local trainmaster observes the trainees. He denied that he did not have any personal knowledge of comments on the Complainant's May 2011 officer evaluation. He stated that he observed the Complainant's classroom performance,

training and test scores. He did not remember any criticisms of the Complainant prior to Mr. Durkin's report. He restated that prior to the issues with Mr. McCorkle and Mr. Durkin "he would have maintained a borderline whether or not we would take a chance on him getting promoted." Mr. Murton testified that he does not have anything written, documenting that the Complainant was a mediocre trainee prior to May 26, 2011. Mr. Murton acknowledged that he was the subject of an investigation regarding charges of falsifying documents. T. at 130-83.

On cross-examination, Mr. Murton stated that prior to the recent investigation, he had never been the subject of any disciplinary action while working for the Respondent. He also provided further detail about the classroom training provided to CTs at the Harrisburg Training Facility and the CT training process. He stated that prior to receiving the email from Mr. McCorkle, he did not know anything about the investigation into the H5A crew. He stated that he viewed Mr. McCorkle's concerns as serious allegations. Mr. Murton did not recall whether he had a conversation with Mr. McCorkle regarding the possibility of discharging the Complainant. He stated that in response to receiving the emails from Mr. McCorkle, he pulled the Complainant's file and reviewed it. He mentioned that after receiving the email with the Complainant's account of what had happened, he felt that the statements of the officers and the Complainant were in conflict. Mr. Murton testified that he did not know what the allegations were against Mr. DiMauro and Mr. Piston, and that he did not participate in preparing the charges. T. at 183-201.

Mr. Murton also discussed which documents were attached to the email to the EEO department. He also explained the significance of some of the notations on the Complainant's March 2011 officer evaluation. After reviewing his May 2011 evaluation of the Complainant's performance, he acknowledged that he received Mr. Durkin's memo regarding the Complainant's performance prior to sending the email to EEO. Mr. Murton stated that Mr. Durkin's memo was a "serious alarm on top of the issue with integrity" and he believed that "for safety, for the condition of his own well-being and the well-being of people working with him, that he was not focused enough to be able to move forward without maybe possibly damaging equipment and safety." He testified that at the time he requested authority from EEO to release the Complainant, he was not aware of the Complainant's testimony at the May 26 hearing or that the Complainant even attended the hearing. Mr. Murton stated that the Complainant's testimony at the hearing did not play any role in his decision to release the Complainant from the training program. T. at 206-29.

Mr. Murton stated that he does not remember how he informed the Complainant that he was released from the training program. He thought that he left the Complainant a message and then informed the Complainant of his release when the Complainant returned the call. Mr. Murton gave examples of other CTs who were released from the training program due to integrity issues. He stated that he is not aware of any CTs who had questions raised about their integrity or were accused of making false and misleading statements, who retained their jobs. He stated that he is familiar with the Respondent's anti-retaliation policies pertaining to employees who report injuries or raise safety concerns. T. at 229-39.

Mr. Murton also testified that he did not place much emphasis on Mr. McCorkle's email asking him if the Complainant had been discharged. He interpreted Mr. McCorkle's email as a request regarding the status of the issue with the Complainant. He also testified that he does not remember which conductors told him that the Complainant needed to be babysat. Mr. Murton testified that the officer evaluations are supposed to be shared with the CTs. He estimated that when he was the training coordinator, approximately 82 to 88 percent of CTs graduated. He also stated that of those who did not graduate about half were released for performance-based issues. He also explained that he works 24 hours per day and constantly receives text messages, emails and phone calls. T. at 255-66.

Timothy McCorkle

Mr. McCorkle testified under oath on behalf of the Complainant and the Respondent. He stated that he presently works for the Respondent as a road foreman of engines. He monitors the performance of engineers and remote control operators, performs safety rules checks and offers educational opportunities to employees regarding operating and safety rules. He testified that on May 12, the H5A crew consisted of Engineer Piston and Conductor DiMaulo; the Complainant was not present. He observed the H5A crew's train sit idle for a period of time. He did not observe Mr. Piston sleeping, but Mr. Bruskotter and Mr. Rossman did. The crew was taken off the train, driven back to Abrams and sent home. He stated that after these observations, he began to generally investigate the H5A crew. The investigation led him to Trainmaster Darrah who, among other things, discussed an incident in which the conductor of the H5A crew was not wearing a safety vest or goggles. He stated that after his conversation with Mr. Darrah, he saw the Complainant on a Thursday afternoon (May 19) in the parking lot at Abrams yard. While on a phone call with Trainmaster Bruskotter, he spoke to the Complainant about the Complainant's work assignment on May 5. Mr. McCorkle stated that he did not have any plans for the Complainant's testimony at the May 26, 2011 hearing. Mr. McCorkle stated that he wanted the Complainant to be present at the hearing as a potential witness. Mr. McCorkle averred that he asked the Complainant to bring his things to the hearing because he thought that the Complainant could study. T. at 267-84.

Mr. McCorkle testified that he only remembers one conversation with the Complainant prior to the investigatory hearing. He recalled questioning the Complainant about whether the H5A crew was smoking, sleeping and delaying the train. He stated that he never told the Complainant that he had a Bluetooth on. He stated that he sent an email to Mr. Murton regarding his conversation with the Complainant because the Complainant denied that his train stopped in the South Philadelphia yard on May 5 to allow the conductor of the Complainant's train to speak to another individual. Mr. McCorkle stated that charges were being contemplated against Mr. DiMaulo and Mr. Piston at the time of his May 19 discussion with the Complainant. He also testified that sleeping on duty violated the Norfolk Southern and CSX operating rules. T. at 284-96.

Mr. McCorkle stated that it was his understanding that the Complainant's application was rejected, in part, for making false statements. He acknowledged that he wrote an email to Mr. Darrah, copied to Mr. Bruskotter and Mr. Rossman on May 19, 2011, following his conversation with the Complainant. He restated that on May 19, he asked the Complainant approximately two

or three times if the H5A train was stopped by the CSX trainmaster to speak to the conductor on the job. Mr. McCorkle added that he told the Complainant that the CSX trainmaster told Mr. McCorkle that he stopped the train to speak to the conductor, but that the Complainant replied that it did not happen. Mr. McCorkle perceived the Complainant's response as a lie and informed Mr. Murton about the dishonesty. Mr. McCorkle acknowledged that he never ascertained whether the Complainant was in a position to hear the conversation between Mr. Darrah and Mr. DiMaulo. He stated that he never asked the Complainant whether Mr. DiMaulo had a safety vest and goggles on, because the Complainant testified that the event with Mr. Darrah and Mr. DiMaulo never happened. Mr. McCorkle believed that Mr. Bruskotter informed him that he overheard the conversation between Mr. McCorkle and the Complainant through the Bluetooth. T. at 310-15.

He testified that his only communication with Mr. Murton about the Complainant was through email and one telephone call on May 19 or May 20. Mr. McCorkle stated that he did not remember discussing the Complainant's possible termination over the phone. He stated that he asked Mr. Murton if the Complainant had been discharged, on account of the Complainant's dishonesty. He also acknowledged that he might have told the Complainant that how the Complainant answered his questions would affect whether the Complainant would be able to keep his job. He explained that "during this time period, a conductor trainee is evaluated on a whole host of items and my belief is that we don't even need to give a reason why we're not hiring the individual." Mr. McCorkle stated that no one told him that the Complainant was needed as a witness at the investigative hearing. He stated that he did not know why the Complainant was called, but stated that he thought the reason might be to talk about the dates when the Complainant was assigned to the H5A crew. Mr. McCorkle testified that he did not know if there was a CFR dealing with sleeping on duty. He stated that he did not investigate the Complainant's work performance. He did not speak to the Complainant on the date of the hearing beyond a greeting and was not present during the Complainant's May 26 hearing testimony. T. at 315-52

On cross-examination, Mr. McCorkle testified that he learned that the Complainant had worked with the H5A crew through the crew call records. He stated that he did not tell the Complainant that he was looking into violations of federal laws, rules or regulations relating to railroad safety. He stated that after his conversation with the Complainant, he called and emailed Mr. Murton due to concerns over the Complainant's integrity and the centrality of integrity to the functioning of the railroad. Mr. McCorkle stated that he helped Trainmaster Bruskotter prepare the hearing charges and noted that none of the charges were based on violations of federal safety rules. He stated that he did not have any further participation in the decision to reject the Complainant's application, after sending the email to Mr. Murton on May 21 asking if the Complainant had been discharged. Mr. McCorkle stated that he has never disciplined an employee for reporting a safety violation or an injury, stating that to do so would be both unethical and illegal. T. at 372-99.

On redirect examination, Mr. McCorkle testified that immediately after the hearing, he worked with Mr. Bruskotter and Mr. Keller to address an accident at the Abrams yard. He stated that he did not discuss the content of the May 26 hearing at that time. He testified that he has never been involved in an FRA investigation while working for the Respondent. Upon my

examination, Mr. McCorkle explained that the decision regarding which employees to notify to appear at a hearing is made by committee. He stated that he and Mr. Bruskotter decided which witnesses to call at the May 26 hearing. T. at 401-24.

Mark Shane

Mr. Shane testified under oath on behalf of the Respondent. He stated that he has worked for the Respondent since 1999. He is currently a locomotive engineer and a mentor to conductor trainees at the Abrams yard. Mr. Shane has been involved in training since 2007. One of his job responsibilities is creating the assignment schedule for the trainees. He explained that the trainees receive operating rules from Norfolk Southern, Conrail, Amtrak, CSX and SEPTA. Mr. Shane stated that he was a CT mentor during the period from January 2011 until May 2011. He mentioned that he prepares monthly evaluations of each CT based on classroom testing and field observations, if applicable. He does not remember whether he worked with the Complainant in the field. In reference to the Complainant's April 17 evaluation, he explained that the Complainant scored in the mid to high 80s during a test containing 130 questions. Mr. Shane noted that the Complainant was tested on the yard map and opined that the Complainant needed to study the map "a little bit more." He also explained that trainees are tested on signals in the classroom and in the field. T. at 605-17.

He stated that when he passes the location where a CT is working, he listens on the radio "to hear if they are making any moves with the radio." Mr. Shane stated that on one occasion in May, he passed the H8E and did not hear the trainee's voice on the radio. The next time he saw Conductor Durkin, the conductor informed him that he had sent the CT home. He stated that he was surprised because he has never had a conductor send a conductor trainee home before. Mr. Shane explained that he asked Mr. Durkin to write a statement regarding his experience with the Complainant, because he wanted to pass the information along to the training coordinator. He was unsure how he received a copy of Mr. Durkin's statement. He reviewed the May 26, 2011 evaluation of the Complainant (RX 23) and stated that his handwriting is at the top, but that Mr. Murton's handwriting is contained in the officer evaluation section. He stated that he filled out the form with Mr. Murton on the Saturday after he received the letter from Mr. Durkin. He stated that much of the evaluation form was based on Mr. Durkin's statement. T. at 617-24.

Mr. Shane explained that the Complainant failed the first physical characteristics ("PC") test, but passed the retest on May 27. He stated that he based the statement that the Complainant "has hard time with signal recognition and should be much more familiar with Abrams yard at this time" on the Complainant's test scores up until that point and the statement from Mr. Durkin. He stated that he did not discuss whether the Complainant should be removed from the CT training program with Mr. Murton. He stated that he did not tell Mr. Durkin what to write in the memo. Mr. Shane stated that at the time he filled out the Complainant's evaluation (RX 23), he was aware that the Complainant had attended an investigatory hearing, but did not know the contents of the Complainant's testimony. He also stated that he did not discuss the Complainant's participation in the hearing with Mr. Murton. T. at 624-29.

On cross-examination, Complainant's counsel referred Mr. Shane to Complainant's CT Monthly Evaluation Form dated April 17, 2011 (RX 21). Mr. Shane stated that he filled out the evaluation accurately. He stated that he has heard of conductors elevating scores in order to make CTs look better, but he does not follow that practice. Mr. Shane acknowledged that Mr. Durkin's evaluation (RX 39) is inconsistent with his memo. He stated that he believed Mr. Durkin's note over the progress report, because Mr. Durkin informed him that he sent the Complainant home. He stated that Mr. Durkin is sometimes referred to as "Get her done" Durkin and "the pleaser" around the railroad. Mr. Shane was unsure why the evaluation form (RX 23) was filled out on May 28 and dated the 26. He stated that he did not discuss the inconsistencies in Mr. Durkin's evaluation and memo with Mr. Durkin. He stated that he does not know the location of the forms for the 5/13/2011 and 5/27/2011 PC tests. He stated that if a trainee fails a PC test, it is not usually a matter of concern. T. at 629-45.

Alphonso Tabb

Mr. Tabb testified under oath at the Respondent's request. He stated that he currently works for the Respondent in manager recruiting. Prior to that, he was the manager of EEO for approximately eight and a half years. Mr. Tabb was the manager of EEO in May of 2011. He stated that he had three EEO officers who reported directly to him. He reported to the assistant vice president for diversity and EEO, David Cox. Mr. Tabb explained that the EEO's office would review all of the conductor trainees who were being recommended for rejection by the training coordinator. When Mr. Tabb was the manager of EEO, he reviewed all of the application rejections, consulted with the EEO officers and signed off on the EEO's review. He stated that in some instances, he disapproved requests to reject applications when he thought more documentation or further action was needed. Mr. Tabb gave some examples of instances in which a CT would be rejected, including allegations involving a CT's honesty. He stated that the Respondent takes integrity very significantly, and if there is information showing that there are integrity issues with an individual, in the vast majority, if not all of those instances, the individual's application for employment will be rejected. T. at 647-52.

Mr. Tabb explained that the Respondent has a code of ethics which applies to all of the Respondent's employees. He stated that ethical complaints were handled by the ethics and compliance department. He also stated that he has trained employees of the Respondent on anti-retaliation policies. He explained that he received specific training in on the anti-retaliation provisions of the Federal Railroad Safety Act in 2010 or 2011. T. at 653-58.

He also discussed the rejection of the Complainant's application. He stated that the request for the Complainant's release was first reviewed by EEO officers and an office intern. These individuals concurred with the department's recommendation to reject the Complainant's application. Then, Mr. Tabb reviewed the information and also agreed with the department's recommendation. He stated that EEO received an email from Mr. Murton (RX 24) regarding the request to reject the Complainant's application for employment. He stated that he did not personally conduct any further investigation into the matter beyond what was reported to him by the EEO officers. T. at 658-61.

On cross-examination, Mr. Tabb stated that he did not know how many FRSA complaints were made against the Respondent in 2010 and 2011. He did not recall seeing Complainant's statement (CX 12). He reviewed Mr. Durkin's memo (RX 22), but did not recall that Mr. Durkin wrote a progress report on the same day (RX 39) which included different statements. He stated that he did not recall whether he was given RX 39. Upon my questioning, Mr. Durkin testified that the EEO department can determine that a CT remain a trainee for an additional period of time, instead of having the employment application rejected altogether. T. at 661-64.

Jason Bruskotter (CX 23)

Mr. Bruskotter testified under oath at a trial deposition on June 12, 2013. He testified that he began working as a road train master in King of Prussia, Pennsylvania in 2010. He stated that he oversees safety and efficiency at the terminal. Mr. Bruskotter testified that he became aware of an incident involving Conductor DiMaulo and Trainmaster Darrah after speaking to Mr. McCorkle. He stated that the incident involved the H5A train being stopped by Trainmaster Darrah after Trainmaster Darrah observed the Conductor DiMaulo working without a safety vest and goggles. He stated that he was on the phone with Mr. McCorkle when Mr. McCorkle spoke to the Complainant, but noted that he was unable to hear the Complainant's side of the conversation. Mr. Bruskotter also testified that he participated in a check on the H5A crew in South Philadelphia with Mr. McCorkle and Mr. Rossman on May 12, 2011. He stated that the check was performed because that particular crew had not been checked in a while, and there was concern about the amount of time it took the crew to complete their work. CX 23 at 4-14.

Mr. Bruskotter noted that after the check, Mr. McCorkle analyzed the speed tapes and determined that the crew had a daily pattern of inactivity; the crew was removed from service and an investigation followed. He noted that neither Mr. Piston nor Mr. DiMaulo was charged with any violations of federal safety laws. Mr. Bruskotter stated that Mr. Piston and Mr. DiMaulo's actions on May 12, 2011 did not cause any safety hazards; he continued that they were stealing time. He testified that he was not in the hearing room during the Complainant's testimony. He also stated that he was never told what the Complainant said at the hearing. Mr. Bruskotter explained that at the end of the hearing, Mr. McCorkle received a phone call regarding an injury at the yard and he returned to the yard. He also testified that he never discussed the Complainant's testimony with Mr. Murton and that he had no involvement in the decision to reject the Complainant's application for employment. Mr. Bruskotter stated that he observed the quality of the Complainant's performance and characterized it as being on par for a new conductor. He stated that he did not regularly report to Mr. Murton regarding the Complainant's work performance. He agreed that the training coordinator determines whether to reject or accept a conductor trainee's application. CX 23 at 15-25.

On cross-examination, Mr. Bruskotter stated that he exercised his seniority and returned to New Orleans as a yard master. He did not recall a conversation between himself, Mr. McCorkle and Mr. Rossman about an incident involving the H5A crew on May 5, which was referenced in an email sent from Mr. McCorkle to Mr. Darrah, copied to Mr. Bruskotter. He testified that he did not remember if he told anyone that he did not hear the Complainant's side of the conversation when he received emails on May 20 and 28 which referenced that Mr. Bruskotter overheard the conversation between Mr. McCorkle and the Complainant. He testified

that he found out that the Complainant had been dismissed, after the Complainant's dismissal; he was unsure whether or not he learned the reason for the Complainant's dismissal. Mr. Bruskotter was referred to an email from Mr. Murton on May 31 which urged him to speak to the Complainant and collect his gear (CX 15). Mr. Bruskotter commented that he did not speak to the Complainant because he believed that Mr. Murton had already spoken to him. Mr. Bruskotter stated that sometime before the Complainant was dismissed, he told Mr. McCorkle that he did not hear both sides of the conversation between Mr. McCorkle and the Complainant because Mr. Bruskotter was doing work around the house at the time. He testified that he did not feel any pressure regarding his testimony at the deposition. On redirect examination, Mr. Bruskotter testified that Mr. McCorkle was handling the issues regarding the Complainant's integrity. CX 23 at 25-82.

John Darrah (JX 2)

The parties jointly submitted the stipulated testimony of Mr. Darrah. He stated that he works for CSX Transportation as a trainmaster. On May 5, 2011, he noticed the conductor of the Respondent's H5A train not wearing a safety vest and safety glasses. He instructed the conductor to put the vest on and gave him a pair of safety glasses. He then entered the rule violation in the CSX operational testing system. Mr. Darrah recorded that he spoke to Mr. McCorkle and Mr. Bruskotter in connection with the investigation into the H5A crew. During that conversation, Mr. Darrah informed them of his interaction with the conductor on May 5.

Mr. Darrah stated that on May 19, 2011, Mr. McCorkle emailed him, asking him to provide a written account of his interaction with the H5A conductor. Mr. Darrah responded to the email on May 20, 2011. He stated that he received a follow-up email on May 20, 2011 asking if a conductor trainee was present on the H5A when he spoke to the conductor. He responded that a CT was present, but that the CT did not come off the step of the locomotive when he spoke to the conductor.

DISCUSSION

During both days of hearing, I had the opportunity to observe the Complainant, as well as several other witnesses. I find that the Complainant was credible in his testimony. I conclude that he testified in accordance with his beliefs and memory about what transpired in May 2011. In addition, I found the other witnesses called at the hearing to be credible and sincere in their testimony. Their recollections about the events of May 2011 were largely consistent with each other and the many exhibits contained in the record. I note that evidence and testimony was offered regarding subsequent disciplinary employment actions brought against Mr. Murton and Mr. Bruskotter, which resulted in both employees exercising their seniority to return to prior positions. However, the testimony regarding the disciplinary incidents was vague and nonspecific and did not persuade me that either employee's recollection of the events leading up to the Complainant's discharge was untruthful.

The Complainant's Burden

The Act incorporates by reference the procedures and burdens of proof for claims brought under the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century ("AIR-21"), 49 U.S.C. § 42121 (2011). See 49 U.S.C. § 20109(d)(2). AIR-21, and therefore FRSA, requires a complainant to prove by a preponderance of the evidence that: (1) he engaged in protected activity or conduct; (2) the complainant suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the unfavorable action. 49 U.S.C. §42121(b)(2)(B)(2011); see Hamilton v. CSX Transp., Inc., ARB No. 12-022, ALJ No. 2010-FRS-025, slip op. at 3 n.3 (ARB Apr. 30, 2013). A complainant who meets this burden is entitled to relief unless the employer can establish, by clear and convincing evidence, that it would have taken the same adverse action absent the protected activity. 29 C.F.R. § 1979.109(a); see also Araujo v. New Jersey Transit Rail Operations, 708 F.3d 152, 159 (3d Cir. 2013).

Protected Activity

By its terms, the FRSA protects employees who "provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security, or gross fraud, waste, or abuse of Federal grants or other public funds intended to be used for railroad safety or security." Following AIR-21 precedent, in order to establish protected activity, a complainant must demonstrate that "the information that the complainant provides must involve a purported violation of a regulation, order, or standard relating to ... safety, though the complainant need not prove an actual violation; and (2) the complainant's belief that a violation occurred must be objectively reasonable." Douglas v. SkyWest Airlines, Inc., ARB Nos. 08-070, 08-074, slip op. at 8 (ARB Sept. 30, 2009) (citing Rooks v. Planet Airways, Inc., ARB No. 04-092, slip op. at 4 (ARB June 29, 2006)). Further, "[t]he information provided to the employer or federal government must be specific in relation to a given practice, condition, directive, or event that affects ... safety." Id.

The Complainant must have a genuine belief that the conduct violates a federal safety law or regulation and that belief must be objectively reasonable. Douglas, ARB Nos. 08-070, 08-074, slip op. at 9. The Complainant testified that he believed that one of the three charges brought at the May 26 hearing, sleeping on duty on May 12, 2011, involved a violation of federal law. T. at 486-87. He stated that one of the FRA rules prohibited sleeping on all Class I railroads and noted that sleeping on duty was prohibited for safety reasons and also possibly to guard against loss of cargo. T. at 440, 527. He testified that while he was unsure if he was told the charges against Mr. DiMaulo and Mr. Piston prior to the May 26 hearing, the charges were read at the beginning of the hearing. T. at 500, 511-12. I find that the Complainant's statement that he believed that sleeping on duty violated a federal law to be credible and sincere. In addition, I find that the Complainant's belief regarding whether sleeping on duty involved a violation of federal law objectively reasonable given that he was tested on it as a "blood rule," its potential for damage and injury and the uncertainty of management regarding whether federal law prohibits sleeping on duty. When asked during the hearing, Mr. Murton and Mr. McCorkle acknowledged that they were unsure whether sleeping on the job was prohibited by federal

regulations. T. at 85, 342, 346. The record establishes that the “blood rules” involved conduct which could cause injury or significant damage. T. at 85, 222, 379, 471. In addition, Mr. Murton testified that some of the blood rules are overseen by the FRA. T. at 84-85. The record establishes that the Complainant was tested on Norfolk Southern’s General Rule involving sleeping on duty on a form entitled “Blood Rules.” RX 15; T. at 514. Thus, based on the record, I find that Complainant’s belief that the sleeping on duty charge involved a violation of federal law is objectively reasonable.

However, after reviewing the transcript of the Complainant’s testimony at the May 26 investigative hearing, I find that the Complainant was not asked about and did not provide specific information or raise any concerns pertaining to railroad safety. See Rougas v. Southeast Airlines, ARB No. 04-139, slip op. at 9-10 (ARB July 31, 2006). The disciplinary hearing against Mr. DiMaulo and Mr. Piston involved three charges: unnecessarily delaying trains in order to obtain overtime on May 4, 5, 6, 9, 10, 11 and 12, 2011 (both); making false and misleading statements to a Carrier Officer concerning a matter under investigation (DiMaulo); and sleeping while on duty at approximately 8:15 a.m. on May 12, 2011 (Piston). JX B at 4. At the hearing, the Complainant was questioned first by Mr. Keller, and then by Mr. Brennan. JX B. Mr. Keller questioned the Complainant about his work with the H5A crew on May 5 and 6. JX B at 45-46. The remainder of the Complainant’s testimony was regarding his conversation with Mr. McCorkle in the Abrams yard parking lot and his discussion with Mr. Murton at training, which the Complainant perceived as threatening. Id. at 47-53. The Complainant did not provide any information about any safety concerns, including concerns about sleeping on duty, at the May 26 hearing.¹³ In fact, the Complainant testified at the hearing in the instant matter that he never observed either Mr. DiMaulo or Mr. Piston sleeping on duty or doing anything which he believed was a safety violation. T. at 488, 503, 510. Thus, there is no evidence of record that the Complainant provided specific information about a safety violation at the May 26 hearing.

In addition, there is no evidence that the Complainant “directly assist[ed]” in the investigation of allegations that Mr. Piston was asleep on duty by testifying at the May 2011 hearing. At the hearing, the Complainant was only questioned about the times he was working with the H5A crew, on May 5 and May 6. JX B. He was not asked any questions about the incident involving Mr. Piston sleeping on duty on May 12, 2011. In fact, the Complainant was not asked any questions about sleeping on duty at all, nor did the Complainant testify regarding sleeping on duty. Consequently, I do not find that the Complainant directly assisted in the investigation of the allegation regarding Mr. Piston sleeping on duty. As the Complainant did not directly assist or provide information regarding conduct which the Complainant reasonably believed constitutes a violation of federal law, I find that the Complainant has not established that he engaged in any protected activity.

¹³ I note that the Complainant mentioned at the hearing that Mr. McCorkle asked him questions “like were you guys smoking on, on the engine, were they sleeping, and were we delaying the train at all. Just about every question he could possibly ask.” JX B at 47. I do not find that this limited statement at all constitutes specific information regarding sleeping on duty.

Unfavorable Personnel Action

The Act prohibits the railroad from actions to “discharge, demote, suspend, reprimand, or in any other way discriminate against an employee” based on that employee’s protected activity. 42 U.S.C. § 20109(a). The parties stipulated that the Complainant’s application for employment was rejected, effective May 28, 2011. JX 1. I find that the rejection of the Complainant’s application for employment effectively terminated the Complainant’s employment with the Respondent. I find that it constituted a discharge, and thus, an adverse action under the Act.

Nexus between Protected Activity and Adverse Action

As I have found that the Complainant has not established that he engaged in protected activity, his complaint must be dismissed. However, assuming *arguendo* that the Complainant was able to establish that his testimony at the May 26 hearing constituted protected activity, I find that he fails to show a nexus between the protected activity and the rejection of his application. The Complainant has the burden of establishing that the Respondent undertook the adverse action, “in whole or in part,” because of the Complainant’s protected activity. 42 U.S.C. § 20109(a); see also 29 C.F.R. § 1982.109(a). This element may be established either by direct evidence or by circumstantial evidence. Douglas v. SkyWest Airlines, Inc., ARB Nos. 08-070, 08-074, slip op. at 11 (ARB Sept. 30, 2009); Clark v. Pace Airlines, Inc., ARB No. 04-150, slip op. at 12 (ARB Nov. 30, 2006); see also 29 C.F.R. § 1982.104(e)(2). Among the factors of circumstantial evidence that may be considered is the temporal connection (or lack thereof) between the Complainant’s protected activity and the adverse action. Robinson v. Northwest Airlines, Inc., ARB No. 04-041, slip op. at 9 (ARB Nov. 30, 2005).

The Complainant does not assert, and I do not find in the record, any direct evidence tying the Complainant’s hearing testimony to his termination. Instead, the Complainant relies on circumstantial evidence to demonstrate that the adverse action was taken because of the Complainant’s testimony at the May 26 hearing. In his brief, the Complainant argues that the temporal proximity between the Complainant’s testimony at the May 26 hearing and the rejection of his application for employment several days later, militates in favor of a finding a causal nexus between the Complainant’s hearing testimony and his termination.

As delineated in the record, the Complainant testified at the disciplinary hearing on May 26, 2011. JX B. On May 28, 2011, Mr. Murton sent an email to EEO requesting that the Complainant be released from the conductor training program. RX 24. On June 1, 2011, Patrick Whitehead, the Division Superintendent of the Harrisburg Division, sent a letter to the Complainant effectively terminating his employment with the Respondent. CX 19. Indisputably, there is a close temporal connection between these two events. Nonetheless, in light of other contemporaneous events described in the record, I find that the close temporal proximity does not persuade me that there is a connection between the hearing testimony and the decision to terminate the Complainant’s employment. See Spelson v. United Express Systems, ARB No. 09-063, slip op. at 3 n.3 (ARB Feb. 23, 2011) (commenting that “temporal proximity alone cannot support such an inference in the face of compelling evidence to the contrary”).

As an initial matter, there is no evidence that Mr. Murton, the individual who made the ultimate decision to reject the Complainant's application for employment, knew about the Complainant's May 26 hearing testimony prior to making his decision to terminate the Complainant's employment.¹⁴ T. at 142-45. Mr. Murton credibly testified that he was not aware of the Complainant's testimony at the May 26, 2011 hearing at the time he requested to release the Complainant from the training program. T. at 229. He also testified that he did not even know that the Complainant had been at the hearing and that due to the way the crew call system functions, he would not have known that the Complainant was present at the hearing until one week after the testimony. T. at 133, 229.

In his brief, the Complainant asserted that "[i]t is also obvious that Murton knew about Complainant's pending testimony," citing a May 20, 2011 email from Mr. McCorkle to Mr. Murton in which Mr. McCorkle makes a reference to "the situation." Complainant's Brief at 22; CX 6. Based on the record and my reading of Mr. McCorkle's correspondence with Mr. Murton, I decline to infer that the reference to "the situation" refers to the Complainant's future hearing testimony. Mr. McCorkle forwarded correspondence with the subject line "NS H5A Crew May 5 2011" to Mr. Murton and wrote, "[a]s we discussed last night, the following emails explain the situation." The emails with the subject line "NS H5A Crew May 5 2011" which precede this email focus on the interactions between Mr. Darrah and Mr. DiMaulo on May 5, 2011. CX 7; CX 8; CX 9. The emails do not mention an investigatory hearing or the potential need for the Complainant's future testimony. Instead, I find that Mr. McCorkle was referring to the integrity concerns involving the Complainant's statement regarding the events of May 5. Consequently, I find that Mr. Murton did not have knowledge of the Complainant's actual or proposed hearing testimony at the time he made the decision to request the Complainant's release from the training program.

In addition, the record clearly establishes that management working for the Respondent had concerns about the Complainant's integrity dating back to May 19, 2011. T. at 451; CX 10. During the investigation of Mr. DiMaulo and Mr. Piston's misconduct, Mr. McCorkle learned of an incident on May 5, 2011 where the H5A train (crew: Mr. DiMaulo, Mr. Piston and the Complainant) was stopped and Trainmaster John Darrah reprimanded Mr. DiMaulo for not wearing safety glasses and goggles. On May 19, Mr. McCorkle questioned the Complainant about the May 5 incident and has stated that he found the Complainant's replies to be untruthful. T. at 325-27. The Complainant asserts that the concerns over his integrity were "manufactured after the fact as a way to exercise control over Complainant and to create a smokescreen for the real reason for his termination." Complainant's Brief at 21. While I do not doubt the sincerity of the Complainant's belief, I find his theory speculative and unsupported by the record. I agree with the Complainant's assertion that no attention was called to the May 5 incident (between Darrah and DiMaulo) until further issues with the H5A crew came to light following the May 12, 2011 inspection. See Complainant's Brief at 21. However, contrary to the Complainant's implications, I find that the railroad's concerns regarding the Complainant's statement about the May 5 incident did not stem from the necessity of Complainant's testimony against Mr. DiMaulo

¹⁴ Mr. Murton's determination was reviewed and ultimately approved by the Respondent's EEO office. T. at 145. There is also no evidence that anyone at the EEO office knew about the Complainant's May 26 hearing testimony.

and Mr. Piston, but the perceived untruthfulness of the Complainant's statement regarding what had transpired.

I find that the evidence supports the Respondent's position that the concerns about the Complainant's integrity arose during the investigation of the H5A crew and led to the Complainant's termination.¹⁵ Mr. McCorkle and Mr. Bruskotter testified that following the May 12 incident, they began to investigate the H5A crew. In the course of their investigation, Trainmaster Darrah was interviewed on approximately May 18 and recalled an incident involving the H5A crew on May 5, 2011. T. at 273; CX 23 at 9-10; JX 2. According to the testimony of Mr. McCorkle and the Complainant, a conversation occurred on May 19, 2011 in the parking lot of the Abrams yard between Mr. McCorkle and the Complainant, in which the May 5 incident was discussed.¹⁶ T. at 274, 284, 450. Mr. Bruskotter also verified that the conversation took place, although he maintained that he was unable to hear the Complainant's side of the conversation. CX 23 at 10-11. According to the Complainant, he was asked by Mr. McCorkle if Mr. DiMauro spoke to the CSX trainmaster about safety goggles and vests. T. at 451. The Complainant stated that he informed Mr. McCorkle that he "didn't know because [he] didn't know who the person was in the vehicle." T. at 451. According to the Complainant, Mr. McCorkle stated that "he didn't believe [the Complainant], he said [that the Complainant was] lying and he's not through with [the Complainant] yet. It's not over"; he also noted that Mr. McCorkle called him a liar. T. at 451, 462.

Following the conversation with the Complainant on May 19 or May 20, Mr. McCorkle called Mr. Murton, the individual responsible for the Complainant's training, and reported the incident. T. at 313, 325. According to Mr. McCorkle, during his conversation with Mr. Murton, he recounted his conversation with the Complainant and noted concerns that the Complainant was lying. T. at 325-26. On May 19, 2011 at approximately 11:56 p.m., Mr. McCorkle emailed Mr. Darrah asking him to send an email documenting their conversation regarding "the H5A on May 5 in South Philadelphia." CX 5. In an email dated May 20, 2011 at 6:30 a.m., Mr. Darrah gave his account of his interaction with the H5A conductor on May 5, 2011. CX 7. On May 20 at 8:11 a.m., Mr. McCorkle responded by asking whether a CT was present when Mr. Darrah approached the Conductor on May 5, adding that the CT denied that such an event took place. CX 8. Mr. Darrah responded at 8:19 a.m., stating that a CT was present, but was riding on the opposite side step of the engine at the time of his discussion with Mr. DiMauro. CX 9. Mr. McCorkle then emailed Mr. Murton at 8:36 a.m. stating that as discussed the previous night, the following emails "explain the situation." CX 6. Mr. McCorkle sent another email to Mr. Murton

¹⁵ I do not address the merits of whether the Complainant's statements regarding the May 5 incident were truthful or not. See Melton v. Yellow Transportation, ARB No. 06-052, slip op. at 13 (ARB Sept. 30, 2008) (quoting "[t]he relevant 'falsity' inquiry is whether the employer's stated reasons were held in good faith at the time [the adverse action was taken], even if they later prove to be untrue") However, I find that the record wholly supports that management sincerely perceived the Complainant's statements as untruthful.

¹⁶ Although Mr. McCorkle initially testified that the conversation took place on May 12, he changed his mind later on in the hearing, and stated that his conversation took place on May 19. This date is consistent with Mr. McCorkle's email to Mr. Murton dated May 20, recounting a conversation with Complainant on the previous day. CX 10.

at 10:43 a.m. explaining his opinion that the Complainant gave a “false and misleading statement” during a conversation on the previous evening. CX 10. Following the discussion with Mr. McCorkle, Mr. Murton discussed the May 5 incident with the Complainant and asked him to write a statement with his account of what occurred. CX 12; T. at 452-53. In addition, on May 21, Mr. McCorkle sent an email to Mr. Murton asking if the Complainant’s employment had been terminated. CX 11.

I credit Mr. McCorkle’s testimony that he believed that the Complainant was lying to him when he questioned the Complainant on May 19 about the May 5 incident involving the H5A crew. I find that Mr. McCorkle’s statements about the sequence of events and his belief about the untruthfulness of the Complainant’s statements is supported by the documents and testimony. The Complainant’s recollection that Mr. McCorkle stated that he was lying and called the Complainant a liar supports that Mr. McCorkle had concerns about the Complainant’s truthfulness based on their May 19 conversation, and immediately voiced those concerns to the Complainant. T. at 313, 451. In addition, the May 21 email supports Mr. McCorkle’s account that he believed that the Complainant’s honesty was a serious issue with a potential impact on the Complainant’s employment with the Respondent. CX 11. The Complainant cites to statements made by Mr. McCorkle that “how [the Complainant] answered his questions would determine whether he would get to keep his job or not” and Mr. Murton that “his answers about the activities of the H5A would determine whether he was going to have a job or not” in support of his position that the allegations regarding his integrity were manufactured. Complainant’s Brief at 22, 23. I do not adopt the Complainant’s suggestion that these statements were made in order to coerce the Complainant’s hearing testimony. Rather, I find that these statements, if made, were intended to focus the Complainant on the importance of making truthful statements about a matter that was under investigation. See T. at 328-29. I also find that the sequence of events and the credible testimony of both individuals support that these statements relate to concerns about the Complainant’s truthfulness and thus, fitness for employment on the railroad.

In addition, the Complainant states that the investigation into the Complainant’s integrity was “slipshod at best” and notes that Complainant’s email regarding his interaction with Mr. McCorkle was not sent to EEO. Complainant’s Brief at 22-23. According to the Complainant, the non-inclusion of the email, “indicates that Murton was purposefully trying to reinforce the false impression created by McCorkle that the Complainant was lying.” Complainant’s Brief at 24. Having reviewed the documents of record, I find that the timeline and evidence of communications regarding the integrity concerns about the Complainant support that management’s concerns were held in good faith. Mr. McCorkle immediately took his concerns about the Complainant’s integrity to Complainant’s supervisor, Mr. Murton. In addition, nothing about the manner in which the investigation into the Complainant’s truthfulness proceeded indicates to me that the concerns about the Complainant’s integrity were being asserted against the Complainant in order to control the Complainant’s testimony at the DiMauro/Piston disciplinary hearing or were pretext for his perceived lack of cooperation with management. Further, the Complainant’s contention that the concerns about his integrity were manufactured and pretext, is unsupported by the record; to the contrary, I find that the concerns existed and led to his eventual termination from employment.

In addition, I disagree with the Complainant's assertion that the concerns about his work performance and competence to advance to employment as a conductor were fabricated. I find that Mr. Murton's statements that the Complainant was a marginal employee prior to the incidents with Mr. Durkin and Mr. McCorkle, are credible. T. at 173. Mr. Murton's statements are consistent with his March 2011 officer evaluation of the Complainant in which he rated the Complainant as low/moderate in all categories and commented that the Complainant was a "slow learner" and that he "will monitor" the Complainant. RX 20. Mr. Murton's assessment of the Complainant's borderline performance is also supported by Mr. Shane's April 2011 "Field Officer, CT Monthly Evaluation Form." RX 21. At the hearing, Mr. Shane explained some of the notations on the April 2011 evaluation, clarifying that the Complainant's results on signal exams were "moderate," that he believed that the Complainant needed improved familiarity with the yard based on the Complainant's testing during training, and that the Complainant needed to recognize signals better, based in part on the signal testing administered during the CT training in Harrisburg. T. at 614-17.

I also credit Mr. Durkin's account of what transpired during his supervision of the Complainant on May 24, 2011. In determining the weight to give Mr. Durkin's evaluation, I have considered the conflict between Mr. Durkin's notes on the Progress Report and the memo to Mr. Shane. JX D; CX 17. Mr. Durkin explained the disparity by stating that it is his practice to take his issues about performance to the head of training, instead of writing them on the CT evaluation form, based on concerns that CTs will not submit a form with negative feedback. T. at 52. The record supports Mr. Durkin's contentions and establishes that these forms were filled out directly in front of the CT, were then given to the trainee to turn in at training, sometimes had artificially elevated scores and were not highly regarded by the conductors or the training officials.¹⁷ T. at 43-45, 52, 69, 90-93, 630. Thus, I find that the disparity between Mr. Durkin's memo and the training evaluation form is not demonstrative of fabrication. Instead, I find that Mr. Durkin's account of the Complainant's work performance on May 24, 2011 was very detailed and supported by the record. Mr. Durkin testified that he sent the Complainant home early on May 24, 2011. T. at 73. The H8E crew information printout for May 24, 2011 substantiates Mr. Durkin's account, indicating that the Complainant left work approximately five hours prior to Mr. Durkin and the other crew member. RX 40. In addition, Mr. Shane mentioned that he noticed that the CT was not present on Mr. Durkin's train on the H58 and discussed the matter with Mr. Durkin. T. at 617-18.

Further, Mr. Durkin's actions subsequent to his observation of the Complainant's work performance on May 24, 2011, support the legitimacy of Mr. Durkin's stated concerns regarding the Complainant's competence as a conductor. Shortly after Mr. Durkin's observation of the Complainant's performance, he spoke to Mr. Shane, one of the individuals in charge of the Complainant's training, regarding his concerns. T. at 51-52. Mr. Shane's narration of his interactions with Mr. Durkin is largely consistent with Mr. Durkin's statement regarding their conversation. T. at 618. Based on the record, I find that Mr. Durkin's concerns regarding the Complainant's job performance were not contrived and formed part of the basis for the release of

¹⁷ In addition, based on the general consensus that the evaluation forms are unreliable, I find that the ratings included on the Complainant's evaluation forms (JX D) are only marginally probative of the Complainant's work performance.

the Complainant from the CT training program. Specifically, I find that sending the Complainant home indicated that Mr. Durkin had many grave concerns about the Complainant's ability to perform his job adequately.

In sum, I find that the temporal proximity between the release of the Complainant and his termination from employment is strongly outweighed by the countervailing evidence regarding the Respondent's good faith reasons for the termination, namely concerns about the Complainant's competence and integrity. I further find that the record establishes that both of these concerns surfaced prior to the Complainant's testimony at the May 26 hearing, his purported protected activity. After thoroughly considering all of the evidence of record, I find that the Complainant has failed to establish, by a preponderance of the evidence, that his May 26 hearing testimony was a contributing factor to the rejection of his application for employment. See 29 C.F.R. § 1982.109(a).

Employer's Action in the Absence of Protected Activity

Once a complainant has established all of the elements of proof by a preponderance of the evidence, the burden shifts to the employer to show "by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior." 49 U.S.C. § 42121(b)(2)(B)(ii). The burden on the Respondent falls between a preponderance standard and proof beyond a reasonable doubt. See Araujo v. New Jersey Transit Rail Operations, 708 F.3d 152, 159 (3d Cir. 2013). As discussed at length, I find that the Complainant is unable to establish all of the elements of proof. However, assuming *arguendo* that I had found that the Complainant had established the elements of entitlement, I would still find that the Respondent has established, by clear and convincing evidence, that it would have released the Complainant from the CT training program in the absence of his hearing testimony.

As discussed above, I find that the concerns regarding the Complainant's work performance and integrity were held in good faith and are well-supported by the evidence of record. The Respondent's assertion that it would have released the Complainant from the CT training program notwithstanding his May 2011 hearing testimony is bolstered by the testimony of Mr. Tabb, the Respondent's former manager of EEO. Mr. Tabb reported that "the vast majority, if not all" of the CTs whom have been the subject of integrity concerns have been removed from the program. T. at 652. Mr. Murton testified similarly, stating that he was not aware of any CT who had questions raised about his or her integrity or was accused of making false statements, and was not released from the CT training program. T. at 235. Consistently, many of the hearing witnesses stressed the importance of honesty and weight given to integrity concerns on the railroad. T. at 100, 326-27, 378-79, 652. In addition, Mr. Murton credibly testified that about half of the individuals who were released from the CT program were let go based on concerns regarding their integrity. T. at 265. He also gave specific examples of other CTs who were released from the training program after questions arose about their truthfulness. T. at 232-34.

In addition, the record reflects that the integrity issues, and the work performance concerns mentioned by Mr. Durkin, occurred in the Complainant's final two weeks in the CT training program. T. at 240-41. If promoted to full conductor, the Complainant would have been

working without supervision. T. at 33-34. I find that the decision to terminate the Complainant's employment fell at a time when the most scrutiny would be placed on his performance and fitness to proceed as a full conductor. Multiple witnesses testified that Mr. Durkin's observations about the Complainant's performance were serious and called into question the Complainant's ability to safely carry out the job of a conductor. T. at 62-63, 101, 228, 628. Accordingly, I find that the Respondent has established, by clear and convincing evidence, that it would have released the Complainant from the CT training program in any event, due to concerns regarding the Complainant's professional competence and integrity.

CONCLUSION

As set forth above, I have found that the Complainant is unable to establish all of the elements of proof, as is required for him to establish that a violation under the Act occurred. 29 C.F.R. § 1982.109(a). In addition, I find that the Respondent has established by clear and convincing evidence that it would have taken the same adverse action against the Complainant. Consequently, I also must conclude that the Complainant is not entitled to the requested relief.

As set forth under the governing regulation, the Complainant's complaint is **DISMISSED**. See 29 C.F.R. § 1982.109(a).

Adele H. Odegard
Administrative Law Judge

Cherry Hill, New Jersey

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, Division of Fair Labor Standards. *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).