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Issue Date: 25 September 2014

Case Number: 2012-FRS-00091

In the Matter of

JAMES A. HUGHES
Complainant
v.

CSX TRANSPORTATION, INC.
Respondent

Appearances:

Andrew J. Thompson, Esq.
Shapero and Roloff
Cleveland, Ohio
For the Complainant

Joseph C. Devine, Esq.
Lindsey D'Andrea, Esq.
Baker Hostetler
Columbus, Ohio
For the Respondent

Before: **Stephen R. Henley**
Administrative Law Judge

DECISION AND ORDER DENYING CLAIM FOR RELIEF

Procedural Background

This matter arises out of a claim filed under the employee protection provisions of the Federal Rail Safety Act ("FRSA"), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L. No.

110-53 (July 25, 2007), and Section 419 of the Rail Safety Improvement Act of 2008 ("RSIA"), Pub. L. No. 110-432 (Oct. 16, 2008).

James A. Hughes ("Complainant") began working as a train conductor for CSX Transportation, Inc. ("Respondent") in July 2000. (Tr. 19-20). CSX is a Class I railroad operating in the eastern United States and Canada. (Tr. 143). Respondent terminated Complainant's employment with CSX, effective September 28, 2010, for failing to protect a shoving movement, his third serious rules violation in a three year period.[1] Complainant thereafter filed a complaint with the Secretary of Labor on November 12, 2010, alleging the real reason he was terminated was in retaliation for reporting a work-related injury on January 29, 2009. Following an investigation, the Secretary, acting through his agent, the Area Director for the Occupational Safety and Health Administration (OSHA), dismissed the complaint on September 10, 2012.[2] (ALJX-1; RX 24).

Complainant timely appealed to the Office of Administrative Law Judges ("OALJ") (ALJX 2) and the case was assigned to the undersigned on November 7, 2012.[3] After two continuances, a *de novo* formal hearing was held in Knoxville, Tennessee on December 3-4, 2013. All parties were present and the following exhibits were received into evidence: Administrative Law Judge Exhibits ("ALJX") 1-11 (Tr. 5-7); Joint Exhibit ("JX") 1 (Tr. 252); Respondent's Exhibits ("RX") 1-45 (Tr. 9-10); and Complainant's Exhibits ("CX") 1-9 (Tr. 7-9) Eleven witnesses, including Complainant, testified at the hearing.

The parties were granted leave to file post-hearing briefs. Complainant and Respondent each filed their respective briefs on June 19, 2014. Respondent subsequently submitted a request to strike a portion of its brief referencing a matter that was subject to a sustained objection. The parties' briefs and the testimonial and documentary evidence submitted at trial were considered in rendering this decision.[4]

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[1] Complainant filed a grievance and, on August 18, 2011, the Public Law Board ordered him restored to service, without back pay for time lost. Complainant continues to work as a conductor in Respondent's Kingsport, Tennessee yard. (RX 21; Tr. 22).

[2] OSHA reviewed the arbitrator's written decision and found "the arbitration proceedings dealt adequately with all factual issues raised in the … complaint and the proceedings were neither palpably wrong nor repugnant to the purpose and policy of the Act" and "defer[ed] to the arbitrator's decision." (RX 24).

[3] On October 22, 2012, Complainant filed a separate complaint with OSHA alleging Respondent committed a new retaliatory act on July 16, 2012 when it imposed a ten day suspension for failing to lock a switch on July 8, 2012. OSHA did not investigate, advising Complainant that he should seek to join the new complaint with the complaint currently pending before the OALJ. On January 23, 2013, Complainant filed a motion seeking leave to amend his complaint, asserting that the actions taken by Respondent on July 16, 2012 were part of the same pattern of harassment and intimidation which gave rise to the original complaint. On February 7, 2013, Respondent filed a motion in opposition to Complainant's motion to amend, arguing consolidation was not appropriate given the numerous factual differences between the two alleged retaliatory acts. I disagreed and granted Complainant's motion to amend his complaint on March 4, 2013. (ALJX 6). However, on December 4, 2013, the court granted Complainant's unopposed oral motion to withdraw his October 22, 2012 FRSA complaint. (Tr. 236).

[4] By separate order issued on April 22, 2014, I memorialized the parties' January 29, 2014 *Joint Notice of Modifications*, where the parties agreed to redact page 33, line 2 through page 40, line 3 of the transcript and withdraw CX 4, 7 and 8 and RX 14-18, 20, 27, 29, 38, 39, 42, 44 and 45. These exhibits and testimony have not been considered by the court in reaching a decision in this matter.

APPLICABLE LAW

The FRSA, under which Mr. Hughes brings his claim, generally provides that a rail carrier may not retaliate against an employee for engaging in certain protected activity, including reporting a work-related injury or illness. *See* 49 U.S.C. § 20109(a).

The FRSA provides, in relevant part, that an officer or employee of a railroad carrier engaged in interstate commerce:

> … may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done…to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee.

49 U.S.C. § 20109(a)(4).[5]

FRSA investigatory proceedings are governed by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 ("AIR 21"). 49 U.S.C. § 20109(d)(2). AIR 21 prescribes different burdens of proof at different stages of the administrative process. At the adjudicatory stage:

> The Secretary may determine that a violation … has occurred only if the complainant demonstrates that any [protected activity] was a contributing factor in the unfavorable personnel action alleged in the complaint [and] Relief may not be ordered … if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

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[5] The 2008 amendments to the FRSA further provide that:

> A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician ….for purposes of this paragraph, the term "discipline" means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record.

Id. at § 20109(c)(2). However, Complainant does not allege Respondent retaliated against him for requesting medical treatment or for following a physician's orders or treatment plan.

49 U.S.C. § 42121(b)(2)(B)(iii), (iv).

Under AIR 21, a complainant must establish by a preponderance of the evidence that he engaged in a protected activity that was a "contributing factor" motivating the respondent to take an adverse employment action against him. Thereafter, a respondent can only rebut a complainant's case by showing by clear and convincing evidence that it would have taken the same adverse action regardless of a complainant's protected action. *See Menefee v. Tandem Transportation Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 6 (ARB April 30, 2010) (citing *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13 (ARB Jan. 31, 2006)); *see also Thompson v. BAA Indianapolis LLC*, ALJ No. 2005-AIR-32 (ALJ Dec. 11, 2007) (Complainant must prove by a preponderance of the evidence that he engaged in protected activity, Respondent knew of the protected activity, Complainant suffered an unfavorable personnel action,[6] and the protected activity was a contributing factor in the unfavorable decision, provided that the Complainant is not entitled to relief if the Respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in any event).

Consequently, in order to meet his burden of proving a claim under the FRSA, Mr. Hughes must prove by a preponderance of the evidence that: (1) he engaged in protected activity, (2) CSX Transportation knew of the protected activity, (3) he suffered an unfavorable personnel action, and (4) such protected activity was a contributing factor in the unfavorable personnel action.[7] *Thompson v. BAA Indianapolis LLC*, ALJ No. 2005-AIR-32 (ALJ Dec. 11, 2007). A "contributing factor" includes "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *DeFrancesco v. Union Railroad Co*., ARB No. 10-114, at 6 (ARB Feb. 29, 2012).[8]

[6] An adverse employment action must actually affect the terms and conditions of a complainant's employment. *Johnson v. Nat'l Railroad Passenger Corp. (AMTRAK)*, ARB No. 09-142, ALJ No. 2009-FRS-6, slip op. at 3-4 (ARB Oct. 16, 2009). *See also Simpson United Parcel Service*, ARB No. 06-065, ALJ No. 2005-AIR-31 (ARB Mar. 14, 2008); *Agee v. ABF Freight Systems, Inc.*, ARB No. 04-155, ALJ No. 2004-STA-34, slip op. at 4 (ARB Nov. 30, 2005).

[7] Although I list the knowledge requirement as a separate element, I note the ARB recently reiterated that there are only three essential elements of an FRSA whistleblower case – protected activity, adverse action and causation, and that the final decision-maker's "knowledge" and "animus" are only factors to consider in the causation analysis. *See Hamilton v. CSX Transportation, Inc*., ARB No. 12-022, ALJ No. 2010-FRS-25 (ARB Apr. 30, 2013).

[8] In *Araujo v. New Jersey Transit Rail Operations, Inc*., 708 F.3d 152, 158 (3rd Cir. 2013), the court held that the employee "need only show that his protected activity was a 'contributing factor' in the retaliatory discharge or discrimination, not the sole or even predominant cause." In addition, an employee "*need not* demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action." *Marano v. Dep't of Justice*, 2 F.3d 1137, 1141 (Fed.Cir.1993) (emphasis in original) (quoting 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20)) (emphasis added by Federal Circuit). *See also Coppinger–Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010) ("A prima facie case does not require that the employee conclusively demonstrate the employer's retaliatory motive.").

Joint Stipulations

The parties, by their joint oral stipulation, agree to the following undisputed facts:

Complainant reported his first on duty injury at about 3 a.m. on January 29, 2009. The injury reported was "tenderness, soreness, inner left knee." The incident occurred at approximately 6:30 p.m. on January 28, 2009 when Complainant slipped and fell while working. The injury was reported to Train Master George Stephenson. Complainant did not initially seek or request medical attention for the injury. Rather, Complainant sought medical attention for this injury for the first time on or about February 11 or 12, 2009. Thereafter, Complainant's injury was changed from "non-FRA reportable" to "FRA Reportable." Complainant has $75,000.00 in lost wages and benefits related to his termination on September 28, 2010 for violating CSX Operating Rule 103. This is the gross amount from which regular employment related withholding and deductions would apply. (Tr. 390).

Issues

Whether Complainant has proven by a preponderance of the evidence that his protected activity contributed, in part, to Respondent's decision to terminate him, i.e. was it a factor which, alone or in connection with other factors, tended to affect in any way the outcome of the decision?

If so, has Respondent demonstrated by clear and convening evidence that it would have taken the same adverse action even in the absence of the protected activity?

If not, what are the appropriate compensatory damages, costs and expenses and what further relief, if any, is appropriate.

Positions of the Parties

Complainant. On January 29, 2009, Complainant reported a work-related injury to Respondent, who then targeted him for greater scrutiny for alleged rules compliance. On July 13, 2010, Complainant was charged with and investigated for a shoving[9] movement violation and subsequently terminated, effective September 28, 2010. He was ordered returned to duty in June 2012, without back pay, pursuant to a collective bargaining grievance procedure. Complainant asserts his September 28, 2010 termination was in retaliation for exercising his rights under the FRSA for reporting his work-related injury on January 29, 2009 and seeks full back pay with interest, compensation for emotional distress and other compensatory damages and punitive damages. *Complainant's Post-Trial Memorandum of Law,* dated June 16, 2014, at pages 14-17.

Respondent. Complainant had a number of disciplinary issues before reporting a work place injury on January 29, 2009. Nearly 18 months later, on July 13, 2010, Complainant failed to properly protect a train movement in the Erwin Yard. After an investigation, Complainant was

[9] A "shove" is the process of pushing rail cars from the rear. (Tr. 47).

terminated for having three serious rules violations in a three year period. (RX 2).[10] A public law board subsequently upheld the finding of a serious rules violation but returned Mr. Hughes to work. (RX 21). Complainant was dismissed for failing to properly protect a shoving movement and not in retaliation for reporting a work-related injury. In other words, Complainant cannot show that his January 29, 2009 injury report was a contributing factor in his September 28, 2010 termination. *Post-Hearing Brief of Respondent CSX Transportation, Inc*., dated June 16, 2014, at pages 12, 18.

Summary of Testimony[11]

Complainant – James Hughes (Tr. 19-140)

I was hired by CSX in July 2000 and gained my seniority in September of 2000. I am a freight conductor (Tr. 19-20). While the engineer operates the engine, the conductor builds, moves, sorts, switches or classifies everything behind the engine. I give the commands to the engineer to go forward and backward. I now primarily do yard work in the Erwin and Kingsport, Tennessee yards but I have done road work. "Yard work" generally refers to putting together trains before they are sent out on the road. (Tr. 22). Everything we do is covered by an operating rule issued by CSX. In addition to written tests, we have operations rules testing, where a train master or masters will go out to the field to observe employees to see if they are in compliance with the rules. (Tr. 25). As a general rule, we do not know when we would be watched and we frequently would not even know they were there. I do know that I have failed three operational tests, none prior to 2009. (Tr. 27).

I suffered an injury on January 28, 2009 while on duty. It was about 6:30 p.m. and I was in the process of sorting and switching cars. When I walked across a track to get to the other side, I stepped on a pile of lime that had spilled out of a car. My foot slipped out from under me and I strained one knee and buckled the other. (Tr. 28). In accordance with the rules, I reported the injury to my train master in Kingsport. (CX 2). The next day or two, the road foreman contacted me about the injury report. I missed about a month or two of work. When I returned to work, I left the Kingsport yard because of the target I had on my back knowing that if I got one more serious charge, I would be terminated. So, I made a seniority move to the Erwin terminal, about 10 miles away. I didn't have any problems over the next several months while working at Erwin. I was tested frequently and passed tests on shoving, radio rules or whatever rules they were testing. (Tr. 41). There were different train masters in Erwin. I know that managers talk about personal injuries during the morning phone conference. While I was at Erwin, I received a safety award for suggesting putting plates on the switches to tell what track the train was one. (Tr. 44).

On July 13, 2010, I failed an operational rules test. I was directing a shove into a track when I was told to bring my train to a controlled stop. About 5-10 minutes later, Mr. George Stephenson and Mr. Ray Griffith showed up and asked why I wasn't protecting a shove in track

[10] Complainant's first serious rules violation was on January 26, 2009 for which he received a 15-day suspension. Complainant was suspended for 30 days after his second serious rules violation on July 8, 2009. (RX 2, 7, 8).

[11] The summary of the hearing testimony is not intended to be a verbatim transcript but merely to highlight certain relevant portions.

number 7, and I explained that I wasn't on track 7. Mr. Griffith and I went round and round about what track I was on and finally Mr. Stephenson said, "Ray, it doesn't matter what track he was in. He's guilty of shoving unprotected. He's going to be charged and taken out of service." (Tr. 46). I had not seen Mr. Stephenson since I left Kingsport 9 months to a year ago.

A shove is the opposite of a pull. Pulling a track is when you hook the engines to a track full of cars and make sure they are all together, coupled up, and pull them out of a track in order to sort them into different tracks. After you are done sorting, shoving a track is when the engine is pushing the cars back into the track. (Tr. 47). The rule states that you must be on or ahead of the leading end of the movement except if you can meet four conditions: you made the determination that the cars that you are shoving into the track will fit into the track; there are no road crossings in the track; there are no intervening switches; and there are no conflicting movements. Since I met these conditions, I believed I didn't need to be at the leading end of the shove. Mr. Stephenson disagreed and I was taken out of service that night and placed on administrative leave pending investigation. (Tr. 50-51). I was eventually terminated but I challenged that determination through the grievance process. They ordered me returned to work without back pay. (RX 21; Tr. 51). I was off about 14 months.

I eventually moved back to Kingsport where I suffered another work place injury. It was June. I was shoving a train across a bridge over a river. When I got out on the river, it was very windy. I got something in my eye. I reported the injury the next day. About a month after I reported the injury, I was charged with a serious rules violation by the other Kingsport train master Rory Padgett for failing to lock a switch. (Tr. 55). But since I wasn't finished with the switch, I believed I didn't have to lock it. I thought I have to lock a switch only after leaving an area. After an investigation, I was assessed a ten day suspension without pay. But CSX eventually reversed and paid me the money. (Tr. 58).

I filed my OSHA complaint after my termination because I believed it was a direct result of the personal injury report that I filed in January 2009. The same train masters that I reported my injury to were also the same train masters who subsequently charged me with violations of the rules and testified against me at disciplinary hearings. (Tr. 60). Before my injury, no one ever came up and said, "You failed a rule." I would just find out about it days or weeks or months later. After the injury, it was "Stop all the action right now. You are being charged with a serious rules violation. There's going to be a discipline. There's going to be an investigation. There's going to be a hearing." (Tr. 61).

At the time I was charged with the rules violations, I didn't think I had done anything wrong because that is how I had done it my entire career. I had no reason to think I was doing it wrong and I had passed tests on it. I also know that when I was disciplined as a member of a crew, I was the only one disciplined.

I have a prior history of rules violations. I was charged with being quarrelsome and boisterous and insubordinate in April 2006. I accepted responsibility and given a 60-day unpaid suspension. (RX 5; Tr. 80). I also had a 45 day suspension starting March 29, 2007 for violating Operating Rule GR-1. (RX 6; Tr. 83). On January 26, 2009, a week before I reported my injury, I crossed too close to the front of a train in the Kingsport yard. The operational testers were

George Stephenson, Ray Griffith and David Blevins. They told me this was a serious rules violation and an assessment would be put in. I signed a waiver admitting the incident. (RX 7; Tr. 86).

I reported to work about 3 p.m. on January 28, 2009. I had a conversation with Mr. Stephenson and Mister Blevins. They told me that they were going to ride along with me that evening. They told me that they were going to try and help me be more efficient in my switches. (Tr. 90). Between what Mr. Adkins had told me, that "they were out to get me," and the switching efficiency sessions, it was clear to me at the beginning of the shift on the 28th that management was not happy with my performance. (Tr. 91). I injured myself the evening of January 28, 2009 and actually reported it about 3 a.m. on January 29, 2009. (Tr. 88).

At my August 21, 2013 deposition, I admit I said that I was not at the leading edge of the movement [into track 9] on July 13, 2010. (Tr. 96). I also admit that I said I was not able to see the bottom of the track 9 at the time of the movement and I made sure there were no conflicting movements. I also agreed that the way I made a positive visual determination that there was sufficient room in the track was that I had already walked down to the bottom of the track. (Tr. 97-8). It was dark on July 13, 2010 when I was making these determinations. I was closer to the 11/12 switch and I was looking to protect the shoving movement going into number 9 track. (Tr. 101). Track 10 had 40 cars on it. (RX 43-74/75). I admit that on July 13, 2010, another crew, if one had been present, could have accessed track 9 without my knowledge because someone could have operated the switch at the south end, even though no crew was actually present. (Tr. 103). I am positive that Mr. Blevins told me to stop the movement on July 13, 2010, not Mr. Griffith. (Tr. 104). When Mr. Griffith was speaking to me, he was talking about track 7 when it should have been track 9 and I would not tell him the correct number when he asked me. He asked me one more than one occasion what the correct track number was and I wouldn't tell him. Griffith was one of the supervisors. I didn't refuse to answer. I just asked him to tell me what track he thought we were in. (Tr. 108). I could tell that Mr. Griffith was getting agitated. (Tr. 112). I was out of work roughly from August 2010 through October 2011. I did not produce any notes or emails or a resume reflecting efforts to find a job. I did not apply for the conductor jobs listed in RX 41. RX 21 is the document submitted by the union on my behalf for my discharge in 2010. It says on page 3, "the crew was instructed by Train Master Griffith to stop the movement." I approved the submission but that portion is incorrect. (Tr. 133).

Patrick J. Murphy (Tr. 142-168)

I am the director of field administration for CSX. CSX is a Class I railroad running about 21,000 miles of track. It has about 13 hump yard facilities and numerous switch yards throughout the system. It runs from Canada to Florida and from the Mississippi River west. (Tr. 143).

In a flat switch yard, the main tracks go down into the yard and there are branch tracks that go off that. It is all flat. When you switch cars in that environment, you normally shove the cars, release them and let them go into those tracks by themselves. A shoving movement is when you have an engine on one end and a cut of cars behind the engine shoving a track. It is moving in the direction in which there is no engine. The CSX Transportation Department has a

Northern and a Southern region. Each region has five divisions, the head of which is the division manager. The immediate supervisor for a conductor is usually a train master, who reports to the terminal superintendent who reports to the division manager. (Tr. 145). Field administration handles all assessments from a violation of our operating rules. The levels of potential violations are minor, serious, and major. A minor violation could be, for example, not having your eyeglasses on and not having three points of contact when you get off a car. A major violation is a red signal violation. Violation of Rule 103, a switch rule, would be considered a serious violation. (Tr. 148). Serious rules violations are progressive in nature, meaning anything within three years counts towards a progression. The first violation is between 5-15 days. Step 2 is up to 30 days and step 3 is up to dismissal. (Tr. 150). Once the assessment is made by the field manager, it is sent to field administration. I read them and determine whether it is minor, serious, or major. I do not check to see if the person has previously reported an injury. I issue the charge letter then the investigation is conduced. A transcript is then prepared. The division manager makes the decision whether discipline is appropriate. My office is then notified and we put out a discipline letter, if appropriate. The employee can appeal to the Public Law Board who will make a final ruling on the discipline, which could be approved, declined or compromised. "Compromised" means the employee committed the violation but the penalty was too harsh. (Tr. 157).

William J. Edelbroich (Tr. 168-188)

I am employed by CSX as senior road foreman of engines, Jacksonville Division. Before that I was trainmaster on the Blue Ridge subdivision. On July 8, 2012, I was conducting an operational test with one of the crews Mr. Hughes was on. I did not know he was on the train crew when we decided to watch that crew. We typically do not know who is on the trains. We observed that they failed to secure the rail of the switch, which is a violation of CSX Rule 104E. When the switch is not being actively used, they must be locked or hooked. (Tr. 178; RX 27). We talked to Mr. Hughes later that evening about the rule and told him it would be an operational test failure. At the time I entered the assessment, I did not know that Mr. Hughes had previously reported an injury. I have previously failed one other person for this rule violation. (Tr. 180). I was not aware that Mr. Hughes was eventually cleared of wrongdoing and his record expunged of this incident.

Rory S. Padgett (Tr. 188-207)

I am employed by CSX Transportation as a line of road train master for the Kingsport subdivision. When I got to Kingsport on August 8, 2011, Mr. Hughes was not there. I had not heard his name before and was not aware he had previously reported an injury or that he had filed an OSHA complaint. Mr. Hughes returned to work in January 2012. I do not know why he came back. On July 8, 2012, I remember Mr. Edelbroich and Mr. Lobosco and I were doing operational testing and we had found a switch lock that had been left unlocked by Mr. Hughes. At the time, we were conducting about 60 operational tests a month for the Huntington division. I tested weekly as a part of a team. On July 8, 2012, we went up to check on the Norfolk Southern crew at South Hill. We were having some issues with the switch lockup. We tested the

Norfolk Southern crew and found them in violation of rule 104E. (RX 15). This was before we observed Mr. Hughes crew. After they had gone into the Eastman plant, we drove up to the switch and saw the lock was hooked through the apparatus but not locked. RX 27 is the condition of the lock when we saw it on July 8, 2012. (Tr. 195). It is a violation of Rule 104E. We eventually talked to Mr. Hughes back at the yard and told him we'd be turning in an assessment on the lock not being locked.

Ron B. Phillips (Tr. 207-215)

I am a terminal train master for CSX at the Erwin, Tennessee yard. I was the investigating officer for the August 21, 2012 hearing involving allegations that Mr. Hughes failed to properly lock the south hill switch. I knew that Mr. Hughes had previously reported an injury.

Noah Asher (Tr. 215-230)

I was a management trainee for CSX from April 2010 to October 2010. A management trainee is someone the company has selected to go into middle management and they take you out and put you in various locations and train you on different aspects of being a manager. In July of 2010, I was working with Train Master Ray Canaday on the Blue Ridge subdivision. I did not know Mr. Hughes nor was aware that he had reported an injury. I was part of an operational team on July 13, 2010 with Ray Griffith, Chris Corey, George Stephenson and Jonathan Steele. I went out on testing at last once a week. On July 13, 2010, we met at the Erwin yard. We discussed what we would do and eventually separated and drove out around the yard to watch crews. (Tr. 217). We did not target Mr. Hughes. We did observe his crew shoving into the number 9 track from the North end and Mr. Hughes directing the movement at the North end of the yard. We did not see Mr. Hughes when we first drove up. It was about 10 minutes before we saw him. RX 25 is a map of the area. The North end is on the right. Mr. Hughes was located on the switching ladder where the tracks break off from the lead, roughly the 12, 13 switch. The train was moving in the southbound direction. (Tr. 220). Mr. Hughes was supposed to be protecting the shove, which required him to be on, at, or ahead of the movement. To be "on the movement" is to be actually physically on the car, the lead car that is going in the direction. "At the movement" is to be a long side of it walking with it. "Ahead of it" would be going ahead of the movement and watching it come to you and stop. Mr. Hughes was not located on, at, or ahead of the movement he was directing. (Tr. 222).

On the night of July 13, 2010, when Mr. Hughes was shoving cars into track 9, there were rail cars in track 10. (Tr. 222). We stopped the movement and approached Mr. Hughes. I asked him if he knew that he was supposed to be at the rear of the shove protecting the shove. He made a comment and I again said that "you understand you're supposed to be at the rear protecting the shove." He responded, "Whatever you say." (Tr. 223). It got a bit heated and Mr. Griffith stepped in. They started talking about what specific track was shoving into and got heated almost to the point of yelling. At that point, Mr. Stephenson stepped in and said it didn't matter what track it was, it was done. Rule 103 was implicated by the actions of Mr. Hughes and I believe he violated it. The rule states that a crew member or other qualified employee must be located at, on, or ahead of the leading movement except when an employee protecting a

movement can make a positive visual determination of the following: there is sufficient room on the track for all the equipment being shoved, there are no conflicting movements, intervening switches and D rails for the proper line for the intended movement; and there are no intervening road crossings. (RX 1). At the time this happened, it was dark. There is a curve that goes around the section of track in the yard and there were cars beside us. There was no way he could have positive visual determination regarding conflicting movements at the time of the movement. (Tr. 225). RX 26 is a picture of the Erwin yard from the north end looking south. I was unaware that Mr. Hughes had reported an injury in January 2009. None of the other train masters or other supervisors on the operational team mentioned that Mr. Hughes may have been injured previously. We did not observe any other failures that night. (Tr. 229).

Raymond D. Griffith (Tr. 237-274)

Since October 2012, I have been a line of road train master for CSX out of Louisville, Kentucky. From October 2007 to October 2012, I was a terminal train master in Erwin, Tennessee. (Tr. 238). On January 26, 2009, I saw Mr. Hughes cross less than 25 feet from the end of standing equipment with a locomotive attached without proper protection. Mr. Stephenson and I approached and he told Mr. Hughes that he was in violation of the rule. Mr. Hughes received a charge letter for this violation. (RX 7).

I was the train master on duty the night of July 13, 2010. Mr. Stephenson had called in and asked if I wanted to do any operational testing. I agreed and told him to come to Erwin. We also called Chris Corey. Noah Asher and Jonathan Steele expressed an interest in going. (Tr. 240). The fact that Mr. Hughes was working at Erwin had nothing to do with the decision to test at Erwin that night. I made that decision because George Stephenson had already been doing some testing at Kingsport and Chris Corey some testing at Blue Ridge. (Tr. 240). We met in the Erwin yard about 8 p.m. to see what jobs were out working. We made our way down to the diesel shop area to begin our testing about 9 p.m. RX 17 is a record of my tests from July 13, 2010.

The first crew we observed was Mr. Hughes' crew. Mr. Jones was the engineer, Mr. Hughes the conductor and the switchman was Mr. Chandler. They were engaging in normal switching operations and we had been watching for about 15-20 minutes when we noticed Mr. Hughes was not in a position to properly protect his shove. We stopped the movement. (Tr. 242). We did not see a rule violation by Mr. Jones or Mr. Chandler. I verbally stopped the shove over the radio. Mr. Blevins was not with us. (Tr. 244). RX 43-74 and 43-75 indicate there were 40 cars in track 10 that night. Mr. Hughes' conduct that night violated Rule 103 because he was not at, on, or ahead of the movement and did not meet the exceptions to the rule because he could not tell whether there were any conflicting movements. Mr. Asher then went to talk to Mr. Hughes about the Rule 103 violation. Mr. Hughes was a little agitated with him. He said he had already been down in the track, that he knew there was room and that it would hold the cars he was shoving. Mr. Asher tried to point out to him that he still needed to protect the shove because there is a switch at the south end of the track. Mr. Hughes was agitated so I stepped in and asked why he wasn't protecting his shove into number 7. At which point he got a real smart attitude and said "I'm not shoving into number 7." I asked what track were you shoving into." He refused to answer. Finally, Mr. Stephenson stepped in and said "it doesn't

really matter what track you were shoving into. The bottom line is you failed to protect your shove." (Tr. 251). We told Mr. Hughes to go ahead and go home and come back the following day for a safety skill seminar. I was there when he showed up. I had been instructed that when Mr. Hughes showed up he was to be taken out of service, put on administrative leave.

While I knew Mr. Hughes had reported an injury in January 2009, that had nothing to do with the events of July 13, 2010. Neither the engineer nor the switchman were disciplined because they did not commit a rules violation. (Tr. 253). After we pulled Mr. Hughes out of service, we had a crew go ahead and finish the shove and place the cars into the track. To the best of my knowledge, no other crews had come into the south end of the track prior to making the move. (Tr. 258). There was no derailment, no injuries or collisions as a result of the move. But a Rule 103 violation means the potential to have one of those is present. We don't always pull people off their jobs when they don't protect a shove. But given Mr. Hughes attitude towards us, we felt his focus would not be on the task at hand and decided to go ahead and let him go home. (Tr. 266). I have seen Mr. Hughes conduct a shoving movement at least a couple dozen times before July 13, 2010, and do not recall any violations. (Tr. 270). I don't think Mr. Hughes was tested more or less than any other crew member. Even if Mr. Hughes had walked down to the south switch and didn't see anything, something could have come in, in the time it took for him to walk back up.

David W. Blevins (Tr. 275-285)

I have been the Director of Management Trainee Programs for CSX since May 1, 2013. Before that, I was the assistant superintendent in Waycross, Georgia. Before that, I was a line or road train master on the Kingsport subdivision from July 2008 to July 2011. George Stephenson reported to me. On January 26, 2009, I recalled that I was on an operational test team with Ray Griffith and George Stephenson. We observed a rules violation with Mr. Hughes and discussed it with him. He was not charged. (Tr. 284). At the time of the violation, Mr. Hughes had not reported an injury. I was the hearing officer for the September 2, 2010 hearing regarding the July 13, 2010 Rule 103 violation. Based on the testimony, I concluded that the area where Mr. Hughes was standing and the fact he was shoving cars into track 9, there were cars present in track 10 that would have prevented him from seeing his shove and adequately protecting his shove. (Tr. 282).

Chris Corey (Tr. 286-292)

I was the road foreman of engines in Erwin from 2007 to 2012. I knew Mr. Hughes as a CSX employee. I was not aware that he had reported an injury in January 2009. On July 13, 2010, I was part of an operational testing team where I witnessed Mr. Hughes directing a shoving movement into track 9. He was standing beside track 13 and there was a cut of cars in number 10 track which blocked his view from seeing the end of his shove. This was a problem because there was an intervening switch on the south end of that track that somebody else could have come into. (Tr. 287-88). The switchman and engineer were not charged because it was Mr. Hughes's job to watch the shove. RX 43-77 is a document that memorializes a rules class that I taught to Mr. Hughes. Rule 103 would have been part of the class. The exception for rule 103 requires no possibility of a conflicting movement. (Tr. 292).

George A. Stephenson (Tr. 293-319)

I have been the Florence Division director of train operations for two years. Before that, I was train master in Kingsport, Tennessee from 2005 to 2009. Mr. Hughes and I previously worked together on a special company project. On January 26, 2009, myself, Mr. Blevins and Mr. Griffith observed Mr. Hughes cross less than 25 feet from the end of standing equipment without three step protection. (Tr. 294-95). I immediately stopped his movement and explained to him the severity of the rule violation and entered an assessment that night. About 8 p.m. the next evening, I talked to Eddy Shelton, a yard master, who told me that Mr. Hughes was given five switch lists that night and he gave two of them back, telling me he wasn't going to get it done. I told Mr. Shelton that I would have a talk with Mr. Hughes and, the next day, instead of marking the switch list, I would take his list and he and I would mark the list together and do some additional training. (Tr. 295-96). On January 28, 2009, Mr. Hughes came in about 3 or 3:30 p.m. I brought him into my office. I had a copy of his switch list for the day. We marked the list. I told Mr. Hughes I couldn't do any work for him but I was going to go out with him and maybe show him some shortcuts to help with some efficiency. Mr. Blevins accompanied me for about the first three and a half hours.

On July 13, 2010, I was a member of an operational testing team that observed Mr. Hughes violate Rule 103. The team was myself, Noah Asher, Jonathan Steele, Mr. Corey and Mr. Griffith. Mr. Blevins was not part of this team. We met in Erwin that evening. We chose that yard because it was Mr. Griffith's territory and we wanted a large terminal where we knew we would have crews operating. The fact that Mr. Hughes was working that night did not factor into our determination to pick Erwin as a test site. (Tr. 297). RX 16 is the company record of operational tests done by me on July 13, 2010. We did a bunch of tests, not just Mr. Hughes. We observed Mr. Hughes was switching into tracks around 9 and 10. We saw him make a shove. He did a proper shove. We observed the crews for about 20 minutes and when Mr. Hughes made the shove into track 9, we observed that Mr. Hughes did not protect his shove. He was standing at the number 13 switch and we were just south of the diesel shop. There were cars in track 10 which blocked his view of seeing track 9, and Rule 103 states that you have to be at, on, or ahead of the leading end of a shove. Mr. Hughes did not make visual determination that a track was clear; he could not see the rear car that he was shoving or the track ahead of it. (Tr. 299).

I am familiar with the exceptions to Rule 103. You have to satisfy all 4 components; Mr. Hughes did not. There is an intervening switch at the south end of number 9 track so at any point somebody could have come onto that track. (RX 1-1). Mr. Hughes couldn't see if there were any additional cars in track 9 where he was standing at track 13. He could not tell if there was a conflicting movement because of the obstructed view with cars on track 10. To be a violation of Rule 103, there only has to be a potential of a conflicting movement, not an actual conflicting movement. You could have had inbound trains, at any point in time somebody could have operated that switch and gone into track 9.

After we saw the violation, Mr. Griffith came on the radio and asked Mr. Hughes to bring his movement to a safe stop. We approached Mr. Hughes. Mr. Asher explained the rule - that

he failed to be at, on, or ahead of the leading end of a shove. When Mr. Asher asked who was protecting the shove, Mr. Hughes said "no body." Mr. Asher asked what track number he was shoving into and Mr. Hughes just said "I'm shoving into that track." Mr. Asher asked Mr. Hughes again what track number he was shoving into and got the same response. It went back and forth and back and forth. I finally stepped in and told Mr. Hughes it didn't matter what track he was shoving into. The point was that he wasn't in a position to protect his shove. I told him he was relieved of his duties for the severity of the rule violation and for arguing with a company officer. (Tr. 303). I knew that Mr. Hughes had previously reported an injury in January 2009. That did not have anything to do with the actions we took on July 13, 2010. The switchman and engineer were not charged because it was Mr. Hughes who was directing the movement in track 9 at the time so he was in charge. The "Big 4" rules for CSX are: to protect your shoves; protect your switches; no equipment to be left in the foul; and you always secure your equipment.

Other than the shoving violation, Mr. Hughes was in compliance with all other rules that day. (Tr. 309). We did not charge him with insubordination. I have charged other employees with a Rule 103 violation before but Mr. Hughes is the first that I took out of service. (Tr. 310). I agree that there was room on the track to hold all the cars that Mr. Hughes was shoving and no other crew actually made a conflicting movement into the south end of the track that night. No derailment resulted from the move, there were no collisions and no one suffered an injury. I was actually with Mr. Hughes when he fell and injured himself in January 2009. He reported the injury to me early the next morning.

Robert J. Frulla, Jr. (Tr. 319-389)

I was appointed regional vice-president of transportation for the northern region on September 1, 2013. Before that, I was division manager of Huntington division from March 2008 to September 2013. Before that, I was division manager of Jacksonville division from March 2005 to March 2008. I have been with CSX for 23+ years, all in management. RX 32 is a December 2010 letter sent to all division managers from the president and CEO of CSX Transportation emphasizing that no one should be retaliated against for reporting an injury or safety issue. We have zero tolerance for harassment, intimidation or retaliation of or against anyone who reports an injury. (Tr. 325). This is also part of employee training.

When there is a rule test failure, the engineers and conductors are afforded an investigative hearing. The hearing is transcribed, and I review and issue discipline or exonerate the employee. RX 4 is James Hughes's employment history. It contains injury reports but I do not take that into account in issuing discipline. I look at prior disciplinary record, including whether there are other major charges or serious rules violations in the past. (Tr. 332).

I started the "Big 4" concept – highlighting the four rules that are predominantly the majority of our accidents – protecting switches, protecting shoves, securing equipment and not leaving equipment in the foul. Between 75-90% of our human factor train accidents are one of those four violations.

Mr. Hughes reported his injury on January 29, 2009. He had two major violations and a serious 1 violation prior to his injury and a serious 2 after his injury. The July 13, 2010 incident

was Mr. Hughes's third serious violation within a three year period. (RX 12; CX 1). RX 9 is the discipline letter I sent to Mr. Hughes for a violation of operating rule 103, a serious rule violation. After reading the transcript and testimony, it was apparent that Mr. Hughes was not in a position to protect a shove that night. (RX 12, 13). I dismissed Mr. Hughes. (RX 2). Rule 103 is one of my Big 4 rules.

Just as our officers go out and conduct operational tests, the FRA (Federal Railroad Administration) sends inspectors out to make rule checks. If they determine we violated a rule, then CSX gets fined. RX 19 contains FRA investigations, one of which where we were fined $7,500.00 for not complying with Rule 103, which is protecting a shove. (Tr. 348).

Mr. Hughes was not the only employee terminated for three serious rule violations in 2010. RX 28, 30 documents employees who were terminated, including several who were terminated for not protecting a shove. (Tr. 349-57). Those persons had not reported an injury. All of the examples at RX 28 involved property damage or derailment. (Tr. 376). If an employee commits three serious offenses within a three year period, he or she may be subject to dismissal. (RX 2; Tr. 387). It is not mandatory but discretionary.

Findings of Fact and Conclusions of Law

Complainant alleges that Respondent violated 49 U.S.C. § 20109(a)(4), which provides:

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

As noted above, actions brought under FRSA are governed by the burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21). *See* 49 U.S.C. § 20109(d)(2)(A)(i). Accordingly, to prevail, Mr. Hughes must demonstrate[12] that: (1) CSX Transportation is subject to the Act and he is a covered employee under the Act; (2) he engaged in protected activity, as statutorily

[12] The term "demonstrate," as used in AIR 21 and FRSA, means to prove by a "preponderance of the evidence." Thus, Complainant bears the burden of proving his case by a preponderance of the evidence. If Complainant establishes that Respondent violated the FRSA, Respondent may avoid liability only if it can prove by "clear and convincing evidence" that it would have taken the same unfavorable personnel action in the absence of Complainant's behavior. *See* 49 U.S.C. §§ 20109(d)(2)(A)(i); 42121(b)(2)(B)(iii)(iv).

defined;[13] (3) he suffered an unfavorable personnel action;[14] and (4) the protected activity was a contributing factor in the unfavorable personnel action. *See* 49 U.S.C. § 42121(b)(2)(B)(iii); *Clemmons v. Ameristar Airways Inc., et al.,* ARB No. 05-048, ALJ No. 2004-AIR-11 (ARB June 29, 2007).

I find Respondent is a "railroad carrier" and Complainant is a covered "employee" within the meaning of 49 U.S.C. § 20109(a). I further find there is no genuine dispute that Complainant engaged in protected activity under 49 U.S.C. § 20109(a)(4) when he reported a work related injury to George Stephenson on January 29, 2009 and that he suffered an adverse employment action when he was dismissed from CSX, effective September 28, 2010. The only remaining issue is whether there was a causal link between the two. Thus, this case basically requires me to answer one single question – at the time the decision was made, why did CSX fire James Hughes? [15] If it was, even in part, for reporting a work-related injury, then CSX violated the FRSA and Mr. Hughes may be entitled to relief. If not, then Mr. Hughes may have a claim, just not under the FRSA. I find the latter.

[13] By its terms, FRSA defines protected activities to include acts done "to notify, or attempt to notify, the railroad carrier or Secretary of Transportation of a work-related personal injury or work-related illness of an employee.**"**

[14] The term "unfavorable personnel action" includes terminating an employee.

[15] Respondent does submit that FRSA's election of remedies provision precludes Mr. Hughes from even stating an FRSA claim, arguing because "Hughes sought protection for his termination under the RLA when he and his union progressed his grievance through resolution by the Public Law Board ("PLB")…he cannot also seek to remedy his termination by filing a claim for retaliation under the FRSA." *Respondent CSX Company's Post-Hearing Brief* at page 38. In support of its claim, Respondent cites to *United States v. Batti*, 631 F.3d 371, 376 (6th Cir. 2011). I disagree. The court in *Batti* simply held that the district court's use of the cost of production was a permissible method by which to determine the value of the information where the defendant was convicted of improperly accessing information from a protected computer, a case easily distinguished from the instant proceeding. Further, the ARB has consistently taken the position that the FRSA's election of remedies provision, 49 U.S.C. § 20109(f), is not triggered by an employee pursuing arbitration under a collective bargaining agreement ("CBA") because a CBA is a private contract and not another provision of law. *See Kruse v. Norfolk Southern Railway Co*., ARB Nos. 12-081, 106, ALJ No. 2011-FRS-22 (ARB Jan. 28, 2014) (Section 20109(f) does not encompass grievances filed pursuant to a CBA); *Mercier v. Union Pacific R.R. Co.,* ARB Nos. 09-101, 121, ALJ Nos. 2008-FRS-3,4 (ARB Sept. 29, 2011(election of remedies provision does not bar an FRSA whistleblower claim because of a previously filed or pending collective bargaining grievance). *See also Norfolk S. Ry. Co. v. Solis*, CIV.A. 12-0306 BJR, 2013 WL 39226 (D.D.C. Jan. 3, 2013) (an appeal of the ARB's *Mercier* decision supporting deference to the Department of Labor's interpretation). Further, the PLB may only hear disputes arising out of the interpretation of the CBA, which does not include retaliation claims under the FRSA. In other words, as Mr. Hughes did not have the opportunity to litigate the same issues before the PLB, I will not defer to the grievance arbitration under the CBA. *See also Koger v. Norfolk Southern Railway Co*., No. 13-cv-12030 (S.D. W.Va. June 19, 2014) (2014 WL 2778793) (Section 20109(f) FRSA election of remedies provision does not bar an FRSA complaint where Plaintiff had already challenged his termination under the Railway Labor Act (RLA); *Reed v. Norfolk Southern Railway Co.*, 740 F.3d 420, 425 (7th Cir. 2014) (appealing grievance to special adjustment board is seeking protection under collective bargaining agreement rather than seeking protection under the RLA); *Pfeifer v. Union Pacific Railroad Co.*, No. 12-cv-2485 (D.Kan. June 9, 2014) (Court rejected contention that FRSA action barred when Complainant appeals a suspension to the Public Review Board because it is the union and not the Complainant who seeks this protection, and the protection sought is not under the Railway Labor Act, but rather under a collective bargaining agreement). Additionally, if an employee can seek protection under both the FRSA and a collective bargaining agreement and not violate the election of remedies provision, then it stands to reason that Mr. Hughes is not bound by findings made by the PLB pursuant to an interpretation of a CBA.

I find the evidence demonstrates that Employer's decision to terminate Complainant, effective September 28, 2010, was not based, even in part, on the reporting of his January 28, 2009 work-related injury. Rather, the evidence shows that the only basis for termination was for Complainant's failure to protect a shoving movement on July 13, 2010, his third serious operating rules violation in a three year period.

The Federal Railway Safety Act protects employees from adverse personnel actions who report injuries. The FRSA does not protect employees from poor personnel decisions. While Mr. Hughes may have a cause of action against Respondent, a retaliation claim under the FRSA is not one of them. The issue in this case is not whether he should have been dismissed at all but whether the dismissal was in retaliation for reporting a work place injury. While Complainant did suffer an adverse employment action when he was discharged from CSX, his "protected activity" (having reported a work-related injury) was not a contributing factor to it.

The following facts all militate against a finding that Complainant's report of injury was a contributing factor to his termination:

(1) Given the nearly 18 months from the report of injury on January 29, 2009 to his suspension on July 13, 2010, there is no nexus between the protected activity and the adverse action. In other words, I find the temporal proximity in this case is not suggestive of a causal relationship between the report of injury and the dates Complainant was suspended from service and subsequently terminated.[16] Again, if Respondent were inclined to retaliate against Complainant for reporting his injury, it would not have waited 18 months do so.

(2) George Stephenson selected the Erwin yard to conduct operational testing on July 13, 2010 because the Kingsport and Blue Ridge yards had already had some testing that night. In other words, Complainant's crew was randomly selected for operational testing on July 13, 2010, it had nothing to do with his January 28, 2009 report of injury.

(3) George Stephenson told Complainant he would accompany him because of performance problems and try and help improve efficiency. If CSX was looking for reasons to terminate Complainant, Stephenson would not have helped him on January 28, 2009. (Tr. 89-90).

(4) If Respondent was "out to get" Complainant for reporting a work place injury, it would not have given him a prestigious safety award. (Tr. 46). Common sense dictates you do not publically acknowledge someone for work place success if you are looking for a reason to dismiss them from service.

(5) Despite protestations to the contrary, Complainant actually did violate Rule 103 the night of July 13, 2010. Rule 103 required Complainant to be at, on, or ahead of the leading end of the movement. (Tr. 289). While Complainant admits he was not at,

[16] *See Hasan v. U.D. Dep't Labor*, 31 Fed. Appx. 328 (7th Cir. 2002) (three months between protected activity and adverse action).

on, or ahead of the leading end of the movement, he posits that he was not required to do so because he qualified for the exception to the general rule - he had determined the cars being shoved into the track would fit; there were no road crossings in the track; there were no intervening switches; and there were no conflicting movements. However, while there may have been no actual conflicting movement in track 9 the evening of July 13, 2010, the potential for a conflict existed and trains on track 10 prevented Complainant from observing track 9 as the movement was being shoved. Complainant was not in a position to see the leading end of the move. (Tr. 255). Complainant himself admits he could not see the bottom of track 9 and a train could have entered the other end of track, even if one did not. Additionally, the bulk of the testimony indicates there was an intervening switch at the end of the track that could have been used to cause a conflict. A conflicting movement need not actually occur in order to be a violation of Rule 103, just the potential for a conflicting movement. That Complainant may have performed the shove in the manner he did countless times previously without receiving a reprimand does not excuse the violation in this instance. (Tr. 96, 225-28, 247-50, 287-88).

(6) Per Complainant's own testimony, CSX was unhappy with his performance before the report of injury. Sometime during the week of January 19, 2009, Keith Adkins, Complainant's co-worker, told Complainant that CSX was "out to get him," "he was on the hit list," and they "were not happy with his performance." After this conversation with Mr. Adkins, Complainant was afraid he was going to lose his job. (Tr. 85, 90-91). As this conversation was prior January 28, 2009, Complainant was aware that CSX was unhappy with his performance before he ever reported his injury.

(7) Complainant's recollection of events is questionable, given his repeated assertion that Mr. Blevins was part of the operational testing team on July 13, 2010, when he was not. Complainant is confusing Blevins's presence at the January 26, 2009 test where Hughes crossed too close to the front of a train and was written up. Complainant signed a waiver for this violation.

(8) Rule 103 is one of CSX's major safety rules and Complainant is not the only CSX employee who has been disciplined for violating the shoving rule. Other CSX employees not reporting work related injuries have also been disciplined for shoving movement violations.

(9) While Complainant was periodically tested, he was not subjected to increased monitoring and scrutiny from supervisors beyond that given to any other employee.

(10) Complainant was the only one disciplined for the July 13, 2010 incident because he was the one responsible for the shoving movement and other two crew members did not commit any rules violations.

(11) While Complainant did not immediately report or immediately seek medical attention the night of January 28, 2009, there is no evidence that Respondent attempted to dissuade him from reporting the injury or express hostility at him for

doing so. In other words, no one at CSX tried to persuade him not to report injury or seek medical care.

(12) Messrs. Asher and Corey were unaware of Complainant's report of injury when they observed the shoving movement violation on July 13, 2010 as part of operational testing team and had no reason to fabricate the operational test failure.

(13) Mr. Griffith continued operational testing on July 13, 2010 after testing Complainant. In other words, Complainant was not targeted. (RX 13).

There is no direct evidence that Complainant's report of injury was a contributing factor. As to circumstantial evidence, *DeFrancesco*[17] advises the court to look at any indications of pretext, inconsistent application of employer's policies, an employer's shifting explanations for its actions, the existence of any antagonism or hostility towards a complainant's protected activity; the falsity of employer's explanation for the adverse action taken; and any change in the employer's attitude toward complainant after he engaged in the protected activity. None of these indications exist in this case. Employer's explanation for the adverse action, that the dismissal was due only to Complainant's failing to protect a shoving movement, is supported by the independent PLB finding that Complainant committed the violation, but his punishment was too harsh. Employer has never shifted the reasons for the termination, always arguing that this was a third serious rules violation in a three year period. There is no evidence of pretext or antagonism towards Complainant, who received a safety award from Employer as well as help to improve his work efficiency.

I acknowledge that "contributing factor" in a FRSA whistleblower case is not a demanding standard and does make it easier for employees to prove causation. A complainant need not show that protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent's "reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is [complainant's] protected activity."[18] However, while this may be a relatively easy contributory factor standard to satisfy, a complainant must still establish that his protected activity was at least a factor leading to the adverse action, even if not "a significant, motivating, substantial or predominant" one.[19]

Complainant submits that "if not for report of a workplace injury [in January 2009] [Hughes] would not have been charged with a serious rules violation in July 2010." *See Complainant's Post Hearing Brief and Exhibits*, dated June 19, 2014 at page 9. I disagree. This is not a case involving a "but-for," situation where, for example, Hughes reported his injury and CSX subsequently convened an investigation into lying about the injury or misrepresenting the extent of the injury. If so, Complainant may have a "but-for" argument – that CSX would never have initiated the investigation but for the report of injury. However, here, the July 13, 2010 investigation had nothing to do with the January 28, 2009 injury – it was for failing to protect a

[17] *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 7 (ARB Feb. 29, 2012).
[18] *Walker v. Am. Airlines*, ARB No. 05-028, ALJ No. 2003-AIR-017, slip op. at 18 (ARB Mar. 30, 2007).
[19] *Allen v. Stewart Enter. Inc.*, ARB No. 06-081, ALJ Nos. 2004-SOX-060, 061, 062, slip op. at 17 (ARB July 27, 2006).

shove, unrelated to the January 28, 2009 injury some 18 months earlier. *Hutton v. Union Pacific Railroad Co,* ARB No. 11-091, ALJ No. 2010-FRS-20 (ARB May 31, 2013)(under certain circumstances a "chain of events" may substantiate a finding of contributory factor).

In *DeFrancesco,* a case cited by Complainant in his closing brief, the employee's suspension was directly intertwined with his protected activity because the employer investigated the reason for the reported injury and blamed the employee for the injury, a case easily distinguishable from the instant case. Unlike *DeFrancesco*, this is not a situation where, "but for" a report of injury, CSX would not have initiated an investigation regarding a false report of injury or untimely report of injury. Instead, the investigation that ultimately resulted in Complainant's third serious violation was initiated some 18 months after the report of injury and only after Mr. Hughes was observed during an operational test to have violated CSX Rule 103 by not protecting a shove.

Complainant also cites as authority *Hutton, supra*, where the employee reported a work place injury and was subsequently fired for missing a return to work exam, and *Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. at 4 (ARB Oct. 26, 2012), where the employee was fired for an allegedly late reporting of an injury. In *Hutton* and *Henderson*, the protected activity and adverse action were inextricably intertwined because the basis for the adverse action could not be explained without discussing the protected activity. Again, these cases are easily distinguishable from the instant case. Here, CSX initiated the investigation into Complainant's actions based on a shoving movement violation and the investigation would have occurred even in the absence of the injury report. In other words, I find Complainant was not investigated for late reporting, not reporting, lying about his injuries, failing to attend a return to work exam, or anything to do with his January 29, 2009 injury report, and he cannot argue that "but for" the report of injury, the resulting shoving violation investigation would not have commenced. Complainant has not established that the report of injury on January 29, 2009 contributed in any part to his suspension on July 13, 2010 or subsequent dismissal on September 28, 2010.

A violation of a major safety rule, based on several eyewitness accounts, is a non-discriminatory reason for terminating Complainant. I find no competent evidence that CSX used the January 29, 2009 report of injury as a pretext to Complainant's July 13, 2010 suspension and September 28, 2010 discharge. Complainant was an otherwise good employee that the company invested much to train. But failing to protect a shove is a serious safety issue, whether or not an injury or property damage occurs, and is a dischargeable offense. The "FRSA does not forbid sloppy, mistaken, or unfair terminations; it forbids retaliatory ones." *Toy Collins v., American Red Cross* No. 11-3345 (7th Cir. Mar. 8, 2013); *Brown v. Advocate S. Suburban Hosp*., 700 F.3d 1101, 1106 (7th Cir. 2012). While Complainant's September 28, 2010 termination may have been excessive, it was not in retaliation for reporting his January 28, 2009 injury but for committing a major rules violation.[20] I find Complainant has not established that the report of injury was a contributing factor to his dismissal.

[20] "An Employer can fire an employee for a good reason, a bad reason, or for a reason based on erroneous facts" as long as that reason is not in retaliation for reporting a work-place injury. *Malacara v. City of Madison*, 224 F.3d 727, 731 (7th Cir. 2000). Such is the case here.

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ORDER

Complainant has failed to establish the required elements of his claim. Accordingly, it is hereby **ORDERED** that the claim and relief sought is **DENIED.**

SO ORDERED.

Digitally signed by STEPHEN R. HENLEY
DN: CN=Stephen R. Henley, OU=Administrative Law Judge, O=Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

STEPHEN R. HENLEY
Administrative Law Judge

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

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

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

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

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

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