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Issue Date: 30 April 2013

CASE NO.: 2012-FRS-3

In the Matter of:

HARRY MULLEN,
Complainant

v.

NORFOLK SOUTHERN CORPORATION,
Respondent

Appearances:

Charles A. Collins, Esq., and Jeff R. Dingwall, Esq.,
For the Complainant

Robert S. Hawkins, Esq., and Joseph P. Sirbak, II, Esq.,
For the Respondent

BEFORE: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER DISMISING COMPLAINT

PROCEDURAL BACKGROUND[1]

This case arises out of a complaint of discrimination filed by Mr. Harry Mullen ("Complainant") against the Norfolk Southern Corporation ("Respondent" or "Norfolk Southern"), pursuant to the employee protection provisions of the Federal Rail Safety Act ("Act" or "FRSA"), 49 U.S.C. § 20109, as amended by § 1521 of the Implementing Regulations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53 and as implemented by federal regulations set forth in 29 C.F.R. § 1979.107 and 29 C.F.R. Part 18, Subpart A. The Act prohibits railroad carriers engaged in interstate commerce from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee or otherwise discriminating against any employee because of the employee's "reporting, in good faith, a hazardous safety or security condition." 49 U.S.C. § 20109(b)(1).

[1] The following references will be used: "TR" for the official hearing transcript; "ALJ EX" for an exhibit offered by this Administrative Law Judge; "CX" for a Complainant's exhibit; and "RX" for a Respondent's exhibit.

On April 28, 2011, Complainant filed a whistleblower complaint with the Occupational Health and Safety Administration ("OSHA") contending that he was suspended and then terminated in retaliation for voicing a safety concern on February 13, 2011, and raising the issue in a safety meeting on February 14, 2011. In a report dated September 30, 2011, the Assistant Secretary made the following findings:

1. Complainant engaged in protected activity on two separate occasions, February 13th and 14th, by voicing his concern about the need for a foreman to work with the gang trackman;
2. Respondent had knowledge of his protected activities;
3. Complainant suffered adverse employment actions; and,
4. Complainant's protected activity was a contributing factor in his suspension and termination.

(ALJ EX I).

Complainant submitted timely objections to the Findings on October 27, 2011. (ALJ EX II). I was assigned the case on November 7, 2011.

A hearing was held by the undersigned from June 26, 2012 through June 29, 2012, in Pittsburgh, Pennsylvania, pursuant to an Order Rescheduling Hearing issued on March 21, 2012. At the hearing, exhibits were admitted into evidence, as further described herein.[2] Both parties filed post-hearing briefs.

ISSUES

1. Does Respondent qualify as a railroad carrier engaged in interstate commerce?

2. Whether Complainant was an employee of Respondent's on the dates of the alleged protected activity?

3. Whether Complainant engaged in protected activity under the Act, on February 13 and 14, 2011, or some other established date, that is, was he, or persons acting on his behalf, about to provide or did provide their employer information relating to any actual or alleged violation of any federal law related to railroad carrier safety or security?

4. If Complainant engaged in protected activity as an employee of Respondent's, whether Respondent was aware of the protected activity?

5. Whether on February 13, 2011, Complainant refused to work and if he did, did he reasonably refuse to work when confronted with an allegedly hazardous safety or security condition related to the performance of his duties?

[2] Specifically, ALJ EX I-III; CX 2-6, 8-14, 16-19; and RX 1-35, 38, 40, 43, 45-50, 54, 56-57, 60-63 were admitted.

6. Did Complainant suffer unfavorable personnel actions, i.e., was he discriminated against in respect to compensation, terms, conditions, or privileges of employment, i.e., when suspended, terminated, and subsequently suspended for three and one-half months without pay?

7. If Complainant had engaged in protected activity as an employee of the respondent and Respondent was aware of the protected activity, did the protected activity contribute, in part, to the decision by Respondent to discipline Complainant, 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?

8. If Complainant establishes a prima facie case of a violation of the employee protection provisions of the Act, whether Respondent can demonstrate by clear and convincing evidence that it would have disciplined Complainant, even in the absence of the protected activity?[3]

9. If Complainant establishes the elements of his claim, what injuries, if any did he suffer?

10. If Respondent violated the Act, what are appropriate compensatory damages, costs, and expenses and what further relief, if any, (i.e., compensation, terms, conditions and privileges of employment, abatement orders) should be ordered?

11. If Respondent violated the Act, are punitive damages appropriate?

STIPULATIONS[4]

1. Respondent qualifies as a railroad carrier, as defined by the Act, engaged in interstate commerce.

2. Respondent maintains a place of business at Conway Yard in Beaver County, PA.

3. Complainant, during the period in question, was a member of the Pennsylvania Federation of the Brotherhood of Maintenance of Way Employes[sic] of the International Brotherhood of Teamsters. At all times relevant to this case, a Collective Bargaining Agreement was in effect between Respondent and its employees, who were members of the Pennsylvania Federation of the Brotherhood of Maintenance of Way Employes[sic] of the International Brotherhood of Teamsters.

4. Complainant had worked since September 13, 1977 as a track worker at Norfolk Southern in various craft positions, including foreman, and in many locations, including Conway Yard.

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[3] During the hearing, I erroneously listed as an issue:

> If Respondent presents clear and convincing evidence of a legitimate motive for disciplining Complainant, whether Complainant can establish by a preponderance of the evidence that Respondent retaliated against him for engaging in protected activity, i.e, that the respondent's stated legitimate reasons were a pretext?

[4] (ALJ EX III).

5. At all times relevant to his complaint, Complainant worked at Respondent's Engineering Department, Pittsburgh Division.

6. Complainant was an employee of Respondent (track worker) on the dates of alleged protected activity.

7. Respondent has, among other rulebooks, a *Safety Code and General Rules*.

8. Discipline is governed by, among other things, the applicable collective bargaining agreements negotiated between Respondent and the labor organizations representing its employees, Respondent's various work rules, past practice, and a body of arbitral precedent. Respondent's Investigation and Policy Manuel (HM 418-447) offers general guidance to supervisors on the development of disciplinary charges and the conduct of investigatory hearings.

9. On February 22, 2011, Respondent charged Complainant with "insubordination" on February 13, 2011.

10. On March 25, 2011, an investigatory hearing was held on the charges contained in the February 22, 2011 "insubordination" charge letter (and the subsequent letters re-scheduling the investigation).

11. On April 14, 2011, Respondent assessed Complainant a 30 day suspension, retroactive to February 14, 2011, for Complainant's alleged insubordination on February 13, 2011.

12. On February 22, 2011, Respondent charged Complainant with "conduct unbecoming," alleging that he disrupted a safety meeting on February 14, 2011, directed offensive language at co-workers, and that he threatened a supervisor.

13. On April 15 and April 20, 2011, an investigatory hearing was held on the charges contained in the February 22, 2011 "conduct unbecoming" charge letter (and the subsequent letters re-scheduling the investigation).

14. On May 5, 2011, Respondent terminated the complainant's employment based on evidence presented at complainant's investigatory hearing on April 15 and April 20, 2011 regarding the events of February 14, 2011.

15. Respondent subsequently reinstated Complainant, effective June 1, 2011. Respondent converted his termination to a three and one-half month suspension (without pay), February 15 through May 31, 2011, pursuant to an arrangement whereby Complainant gave up his right to pursue a grievance for the termination under the CBA.

16. The suspension resulted in a loss of $15,059.20 in pay and benefits for Complainant.

17. Complainant filed his FRSA complaint with the Department of Labor, on or about April 28, 2011, alleging Respondent discriminated against him in violation of the FRSA.

18. The complaint was timely filed.

19. The Assistant Secretary issued findings dismissing the complaint on or about September 30, 2011.

EVIDENCE[5]

At the time of the hearing, Complainant had worked in the rail industry for almost thirty-five years. (TR at 141). In fact, he began his employment with Respondent's predecessor, Conrail. (TR at 141-42). He is a member of and lodge secretary treasurer for the Pennsylvania Federation of the Brotherhood of Maintenance of Way Employes[sic] of the International Brotherhood of Teamsters ("BMWED"). (ALJ EX III; TR at 28, 399-400). In February 2011, he was working as a backhoe operator in Conway Yard and had been since November 2010. (TR at 145).[6] Before working as a backhoe operator, he worked as a foreman on a Brandt truck for one-and-a-half to two years at various headquarters including Conway Yard. (TR at 145-46). Sometime prior to that, he worked as a foreman essentially acting as a timekeeper clerk at Conway Yard for about four years. (TR at 146-47, 165). Before that, he held a position in Conway Yard where he actively worked on the tracks daily. (TR at 165). Conway Yard is a Hump Yard.[7] (TR at 71).

On Sunday, February 13, 2011, a total of seven employees were scheduled to work in the weekend gang: the terminal supervisor, Greg Andrews; four trackmen, Matthew Schlieper, Kiane Honeywood, Joe York, and Roland McCloskey; a track inspector, Thomas Joseph; and a backhoe operator, Complainant. (TR at 40-41, 73-75). Mr. Andrews decided the switches needed to be greased in Conway Yard using watchman lookout protection and divided the trackmen into two groups after having a safety briefing. (TR at 75-76). Mr. Schlieper and Mr. Honeywood were paired together and assigned to work in 2 Yard. (TR at 75-76). Additionally, Mr. York and Mr. McCloskey were paired together. (TR at 76). Because it was Mr. York's and Mr. McCloskey's first day in Conway Yard, Mr. Andrews provided that both he and Mr. Joseph would be nearby. (TR at 75-76). Complainant was assigned to break apart panels with a backhoe. (TR at 75-76).

Thereafter, Complainant objected to the assignments telling Mr. Andrews that he needed to call in a foreman to work with Mr. Schlieper and Mr. Honeywood. (TR at 76).[8] Mr. Andrews explained that a foreman was not necessary for the work being performed that day. (TR at 76). There is conflicting testimony concerning whether or not Complainant was ordered to be a

[5] The court reporter's numbering of the exhibits in the transcript and those written on the exhibits themselves do not coincide. The numbering in this Decision and Order is consistent with the exhibits as marked. CX 5 is a copy of 49 C.F.R. § 214.315. CX 6 is a copy of 49 C.F.R. § 214.353, and CX 8 is the interpretation of it and the periodic exam. CX 9 is a copy of 49 C.F.R. § 214.311, and CX 10 is a copy of 49 C.F.R. § 214.313.
[6] CX 18 is Complainant's personnel records.
[7] CX 3 is a map of Conway Yard.
[8] Both Mr. Schlieper and Mr. Honeywood had roughly six months of experience. (TR at 295, 642).

foreman.[9] Complainant's counsel argues at length that there is a difference between being asked to do a job by a supervisor and being ordered to do a job. I find this to be a distinction without a difference. In fact, even Complainant's own testimony indicates he believed he was being given an assignment; otherwise, there would have been no reason for him to respond that he had another job and wasn't qualified. The only witness to testify Complainant was not asked to be a foreman was Mr. McCloskey, who testified he believed Mr. Andrews was joking. Mr. McCloskey testified he believed Mr. Andrews was joking because he offered Complainant the job in a non-serious manner; however, no other witnesses believed Mr. Andrews was joking. (TR at 419). Therefore, I find Complainant was ordered to be a foreman. Complainant, though, refused his assignment.[10] All of the witnesses except Complainant and Mr. Schlieper (both of whom cited different reasons for refusal) stated Complainant refused for two reasons, he had another job and he wasn't qualified.[11] Thus, I find Complainant refused for two reasons.

Complainant testified he left the morning meeting believing that all of the trackmen were going to work in one group under the oversight of Mr. Joseph and Mr. Andrews.[12] (TR at 186). Later that day, though, Complainant heard over the radio that Mr. Schlieper and Mr. Honeywood had gotten lost. (TR at 186-87). Complainant then decided to raise his concerns during the Monday morning safety meeting. (TR at 187). Sometime before the February 14, 2011 meeting, Mr. Fleps was informed of Complainant's alleged insubordination. (TR at 191, 664-66).[13]

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[9] Mr. Andrews testified that he "instructed" Complainant to be the foreman. (TR at 76-77). Complainant argues that because Mr. Andrews answered in the negative to "You never offered him a job as watchman lookout, correct?" there was never an order. (*see* TR at 86). To argue that Complainant did not know precisely what job he was being asked/ordered to perform when he was the one who told Mr. Andrews that a foreman was necessary is disingenuous at best. Complainant testified that Mr. Andrews said, "[W]ell, then you be the foreman." (TR at 180). Complainant does not believe he was ordered to be a foreman because "it didn't sound like an order, it sounded more like a suggestion and when I told him I wasn't qualified, that was the end of it." (TR at 181-82). Mr. Honeywood testified he *believed* he remembered Mr. Andrews asking Complainant to be a foreman. (TR at 313). Mr. McCloskey testified he believed Mr. Andrew's "was joking telling Harry well, you know, if you have such a problem with it, why don't you be the foreman for the day?" (TR at 418-19). Mr. York testified that Mr. Andrews stated, "If you have a problem with it, then you be the supervisor. If you really think there's a problem, then you be the foreman." (TR at 506). Mr. Schlieper testified that Complainant was offered the job as a foreman. (TR at 546).

[10] Complainant testified that he refused to work by saying he wasn't qualified. (TR at 180-81). Complainant admits that he said he already had a job, but not to saying that's not my job. (TR at 256-57). Mr. Andrews testified Complainant refused saying "he had a job and wasn't going to do it," but also acknowledged Complainant said he wasn't qualified. (TR at 76, 93). Mr. Honeywood testified he *thought* Complainant said he wasn't qualified. (TR at 313). Mr. McCloskey stated that Complainant cited his lack of qualification and that he had a bid in job as the reasons why he declined the job as a foreman. (TR at 419). Mr. York testified that Complainant objected to his assignment as a foreman saying he already had a bid in job and wasn't qualified; however, in his written statement, he wrote that Complainant refused stating that "he had a job." (RX 2; TR at 506). Mr. Schlieper testified that Complainant said he already had a bid in job, which was consistent with his written statement. (RX 4; TR at 546). None of the contemporaneous written statements offered into evidence state that Complainant mentioned his purported lack of qualifications when refusing Mr. Andrews' instructions. (RX 2, 3, 4, 62.)

[11] Mr. Andrews' deposition dated June 1, 2012 is CX 2.

[12] There is some dispute as to whether the safety concerns were actually resolved; however, whether they were or not is not outcome determinative. (*see* RX 3; TR at 312-13, 438).

[13] In an effort to impeach Mr. Fleps, Complainant's counsel stated, "Mr. Fleps, you testified just a moment ago that you spoke to Mr. Andrews on the morning of February 14th and that was when he first became [aware] of an issue with Mr. Mullen on February 13th," but during the investigatory hearing you explained that the first time you were aware of the February 13, 2011 safety concern was when Complainant brought it up Monday morning. (*see* TR at 655-57). Mr. Fleps testified his statement during the investigatory hearing was a mistake; however, it bears mentioning that two separate questions were asked one with regard to complainant's alleged insubordination and the

On February 14, 2011 during the Monday morning safety meeting, Complainant raised his concerns about the job assignments on February 13, 2011 when the floor was opened for questions. Complainant testified that he asked Mr. Fleps, "Why did you have two unqualified men working in the yard without a foreman or any supervision?" (TR at 190). Mr. Fleps responded that they were qualified, but Complainant continued to insist they were not. (TR at 191). The conversation escalated until Complainant uttered "Fuck safety." There is conflicting testimony as to precisely what Complainant said; however, I find that the weight of the evidence establishes that Complainant did indeed say "Fuck safety." Mssrs. Andrews, Brown, Fleps, and McElroy all testified that they heard Complainant say "Fuck safety."[14] I give less weight to the testimony of Mssrs. McCloskey, York, Honeywood, and Pharr as they deny hearing Complainant use any profane language,[15] which is contrary to Complainant's own testimony that he said "Fuck it."[16] Many of the other eye witnesses' written statements indicated that they were unable to hear the entire conversation including Mr. Schlieper's, (RX 18), and all of the non-management employees' statements failed to mention anything about Complainant saying even "Fuck."[17] (CX 13, 19; RX 5-33). Consequently, I give little weight to these statements as they contradict Complainant's own testimony. Finally, it bears mentioning that it was through this heated discussion that Mr. McElroy learned that Complainant had refused an assignment the prior day. (TR at 717).

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second with regard to Complainant raising a safety concern. (TR at 655-657). Even assuming Mr. Fleps' statements were conflicting, complainant's testimony establishes that Mr. Fleps was aware of the alleged insubordination prior to the meeting. (TR at 191). Therefore, I find Mr. Fleps knew of Complainant's alleged insubordination prior to the safety meeting.

[14] Mr. Andrews testified Complainant said, "Fuck NS, fuck safety, I quit, I'm out of here, done." (TR at 576). Mr. Brown testified Complainant said, "Fuck safety and just forget it." (TR at 615-16). At the formal investigation, Mr. Brown testified Complainant said, "Fuck it," but since then, Mr. Brown had the opportunity to review his written statement and refresh his recollection and now testifies that Complainant said "Fuck safety." (TR at 618-34). Mr. Fleps testified, "At one point, we were shouting and I believe Ben McElroy, my boss, . . . made some comments in support of what I was saying and what they were doing was safe and at some point, Harry had enough and he threw his arms up in the air and said, 'Well, fuck safety.' " (TR at 643-44). Mr. Fleps testified that at the investigatory hearing he stated that Complainant "basically said, 'Fuck safety.' " (TR at 658 (citing CX 14 at 47)). Mr. Fleps clarified that what he meant was that Complainant, "may have made some additional comments prior to saying, 'Fuck safety,' but there [was] no question in [his] mind that's what came out of [complainant's] mouth." (TR at 658). Mr. McElroy testified Complainant said, "You guys don't care about safety. Fuck safety." (TR at 690).

[15] Mr. McCloskey testified that he did not hear Complainant utter "Fuck safety" and never heard Complainant swear. (TR at 425). Mr. York testified that Complainant said "Well, forget it. Obviously safety doesn't matter as much as you guys say it does" and would never say "Fuck safety," "because he was so worried about our safety." (TR at 514-15). Mr. Honeywood testified there was a lot of commotion during the safety meeting and he did not hear Complainant use the "F" word or very much profanity. (TR at 320-22). Mr. Pharr testified it was difficult to hear. (TR at 469).

[16] Complainant testified that he "walked over towards the middle of the floor . . . and told [Mr. Fleps] . . . you're just trying to spin this to be my fault and taking shortcuts on safety and I said F-it, I'm not saying anything else." (TR at 192). Seeking further clarification as to what precisely Complainant said, Respondent inquired of Complainant, "And you do admit that you said the 'F' word?" (TR at 274). Complainant responded in the affirmative, specifically, "I said 'F' it, yes." (TR at 274).

[17] Mr. Brown was the only one to write he heard "Fuck safety." (RX 33). Mr. York did mention that there was profanity but did not mention specifics. (RX 19).

After Complainant said "Fuck safety" and returned to his seat, Mr. McElroy sternly asked Complainant to go outside.[18] (TR at 192, 515, 691). Mr. McElroy's and Complainant's accounts differ as to what exactly transpired outside. I credit Mr. McElroy's testimony as to what was said in part because his testimony as to what happened during the safety meeting is consistent with my findings and because his testimony reveals an escalating conflict. If Mr. McElroy was indeed upset solely based on Complainant disrupting the meeting, he would have called his supervisor immediately. Instead, as both men testified, they engaged in some sort of discourse prior to Mr. McElroy placing a phone call to his supervisor.[19] In addition, Complainant's version of events seems unlikely because he testified he previously raised safety concerns and doing so was encouraged.[20] (TR at 195). Also, Mr. McElroy's testimony in large part is corroborated by Mr. Fleps' although Mr. Fleps was not present for the entire conversation. Finally, although Complainant generally exuded a calm demeanor during the June 2012 hearing, when probed with questions that called into question his version of events, he became agitated.

For the above mentioned reasons, I find Complainant continued to vent his frustrations outside the meeting and said, "You know, I'm just mad. You got these two fucking idiots out here graphiting switches." (TR at 691). Mr. McElroy reprimanded Complainant telling him "I can't have you talking about your fellow co-workers like that." (*Id.*) Thereafter, Mr. McElroy called Mr. Webb, his supervisor, and Complainant called his union representative, Mr. Paul Dominic. (TR at 192, 691). Mr. McElroy told Mr. Webb he thought he needed to "get [Complainant] off the property" and "remove him from service." (TR at 692). Mr. McElroy then approached Complainant who was still on the phone. (*Id.*) Complainant asked Mr. McElroy what he did wrong and Mr. McElroy responded, "[Y]ou disrupted a safety meeting," and then said, "I'm not going to talk about it anymore with your phone on." (TR at 692).

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[18] Complainant testified "So I started walking towards the door and whenever I start walking towards the door, it's where I was standing to begin with, by the door, Ben McElroy stepped in front of me and he said in a pretty stern voice 'outside.' " (TR at 192).

[19] Complainant testified the events happened as follows

> So I just kind of stopped and looked at him and then he told me again outside. So I went outside and when we were outside he says to me, he says you can't be disrupting the meeting like that, and I said I didn't disrupt the meeting.
>
> I said John asked a question, I raised my hand, he acknowledged me and he just kind of stared at me and then he walked away and I heard him get on the phone and I heard him say boss, we've got a situation down here in Conway and at that time I thought I'd better call my union.

(TR at 192). Mr. McElroy testified,

> I said, 'Harry, what's going on' and at that time, Mr. Mullen said, 'You know, I'm just mad. You got these two fucking idiots out here graphiting switches' and as soon as he said that, I stopped him. I said, 'Harry, I can't have you talking about your fellow co-workers like that. We just need to stop, that's enough' at which time, I stepped away from Harry a few feet and I got my cell phone out and I called my supervisor, Mr. Webb, to talk to him about what had happened.'

(TR at 691).

[20] Complainant testified he had brought up safety concerns in other meetings. In fact, he testified :

> [w]ith John Fleps and Mr. Webb and Mr. Morelli any, you know, I mean, if there is an issue they encouraged it and I even went up to Mr. Webb a few times and a couple of times I asked him if, you know, I said, I mean, is it okay?
>
> Did you mind me bringing up this question? And he told me he said no, we encourage that. We like it when you do that.

(TR at 195). Additionally, employees other than Complainant confirmed at the hearing that supervisors encourage raising concerns related to safety during the daily safety meetings and that no employee has been disciplined for raising such a concern. (TR at 322, 332-33, 458,466, 554-55).

Complainant inquired, "Is this an investigation?" and Mr. McElroy responded, "No, Harry, I'm just trying to figure out how to handle this. You disrupted a meeting and I can't talk about it anymore with your phone on." (*Id.*) Complainant turned his phone off, and Mr. McElroy went to go see Mr. Fleps to find out what he had heard. (TR at 647, 692). Mr. Fleps confirmed Complainant had said "Fuck safety." (TR at 692-93). Mr. McElroy and Mr. Fleps spoke to Mr. Webb again and he agreed Complainant should be taken out of service. (TR at 647, 692-93, 809). Mr. McElroy then approached Complainant and informed him, "I'm removing you from service. You'll be out of service pending a formal investigation and at that time, Harry, you could see a little bit of rage coming back into him and he turned and he said, 'Well, what did I do? What did I do?' " (TR at 693; *see* TR at 647). Mr. Fleps answered, "Well, Harry, you said, 'Fuck safety' in a safety meeting." (TR at 693; *see* TR at 647). Complainant then stepped towards Mr. Fleps and pointed his finger in Mr. Fleps' face, and said, 'You're lying, you're a liar.' " (TR at 693-94; *see* TR 647-48).[21] Mr. McElroy then told Complainant to leave, which he did. (TR at 648, 693-95).

Complainant was charged on February 22, 2011 with insubordination and conduct unbecoming.[22] He was notified of the date of the formal investigations by letters dated March 1, 2011. (RX 45).[23] On March 25, 2011, an investigatory hearing was held on the charges contained in the February 22, 2011 "insubordination" charge letter (and the subsequent letters re-scheduling the investigation). On April 15 and April 20, 2011, an investigatory hearing was held on the charges contained in the February 22, 2011 "conduct unbecoming" charge letter (and the subsequent letters re-scheduling the investigation). Mr. Webb heard testimony and reviewed numerous pieces of evidence including the written statements from employees regarding the February 13, 2011 and February 14, 2011 events, and a radio recording transcript from February 13, 2011. (TR at 815-59; RX 2-34; CX 19; *see also* CX 13) (RX 35 is the actual radio recording).[24] By letter dated April 14, 2011, Complainant was informed he was suspended thirty days retroactive to February 14, 2011 for his insubordination on Sunday, February 13, 2011 for failing to follow instructions to perform foreman duties. (RX 46). By letter dated May 5, 2011, Complainant was informed that based on the investigation convened on April 15, 2011 and concluded on April 20, 2011, Complainant was dismissed from all services of Respondent. (RX 47). Complainant appealed through his union. (RX 48).

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[21] Complainant's testimony as to what transpired was

> I said John, that's a lie and Ben McElroy said now you're calling the supervisor a liar. I said I didn't call him a liar, I just said that that's a lie and those two walked away from me and it's, like, 30 seconds later came over and told me that I was out of service, that I had to leave the property immediately and I looked at him I said, you know, I really expected more from you guys and I said I can't believe that you're pulling me out of service for a safety reason and so I got my car and I, like, went around and circled around just the road and I stopped at the backhoe to get my jacket and Ben come walking over to make sure that I was leaving.

(TR at 193-94).

[22] RX 40 is Respondent's General Conduct Regulation 1.

[23] RX 45 was admitted, but the correspondence regarding postponements was not. (TR at 712-13).

[24] Mr. Andrew's statement, (RX 62), was not among those reviewed by Mr. Webb because it had been misplaced. (TR at 600-12). It was admitted as corroboration to Mr. Andrew's testimony at the June 2012 hearing as to what happened on February 14; however, as to the 13th, I will consider it with respect solely to the rebuttal of the fabrication of the yelling comment. (TR at 611-12). Also included in the record are the handwritten notes of Ben McElroy. (RX 60).

On May 18, 2011 and May 19, 2011, emails between Mr. Kerby, the union representative, and Mr. Webb were sent back and forth discussing a possible waiver and conversion of complaint's termination to a suspension. (RX 49). On May 20, 2011, in a letter signed by Mr. Dodd,[25] the General Chairman of BMWED, Complainant, and Mr. Holt on behalf of Mr. Kerby, Complainant was reinstated effective June 1, 2011 due in part to the fact that Complainant had acknowledged his conduct on the dates that were the bases for the investigatory hearings, was inappropriate. (RX 50). Since being rehired, Complainant has worked for Respondent as a Gradall operator. (TR at 140).

On November 5, 2011, Complainant received a congratulatory letter from Respondent providing that he had worked for over twenty years without an injury. (CX 4).

Respondent takes safety very seriously. Respondent has new hire training for Roadway Workers that lasts eight hours during which employees are given PowerPoint slides and a Roadway Protection Manual. (RX 41, 42; TR at 802-04). Additionally, each new hire receives training on watchman lookout protection, which includes a demonstration video. (RX 42; TR at 803-817). Respondent keeps records of employee training history, (RX 56 (Honeywood), RX 57 (Schlieper)). (TR at 802-04). [26] In addition to this initial training, daily safety briefings are conducted and re-briefings may occur. (TR at 237-38). Included in daily briefings is a "Rule of the Day." (TR at 800-01). In addition to a weekly safety meeting, Respondent conducts safety committee meetings and performs safety audits, (RX 54). (TR at 649-52). Finally, Respondent's supervisors receive training for anti-retaliation under the provisions of the FRSA. (RX 38; TR at 806-08).

LAW

The FRSA prohibits railroad carriers engaged in interstate commerce from discharging or otherwise discriminating against any employee because he engaged in protected activity. The whistleblower provision incorporates by reference the burden shifting framework under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121(b); *see* 49 U.S.C. § 20109(d)(2)(A).

The complainant carries the initial burden of establishing the elements of his claim by a preponderance of the evidence. These elements are:

(i) The employee engaged in a protected activity or conduct;
(ii) The employer knew or suspected, actually or constructively, that the employee engaged in the protected activity;
(iii) The employee suffered an unfavorable personnel action; and
(iv) The circumstances were sufficient to raise an inference that the protected activity was a contributing factor in the unfavorable action.

[25] RX 63 is Mr. Dodd's deposition testimony dated June 4, 2012 concerning his conversations with Mr. Kerby as well as other events going on at Conway Yard at that time. (TR at 784-85).
[26] RX 41 is the Roadway Protection Manual that Respondent trains its employees with and gives each employee a copy. (TR at 802). RX 42 is the PowerPoint slides Respondent gives in association with the manual. (*Id.*) RX 43 is the training video. (TR at 804).

29 C.F.R. § 1979.104(b)(1)(i)-(iv); *see also Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037 at 13 (ARB Jan. 31, 2006) (defining preponderance of the evidence as "superior evidentiary weight"); *Clemmons v. Ameristar Airways, Inc.*, ARB Nos. 05-048, 05-096, ALJ No. 2004-AIR-11 (ARB June 29, 2007); *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003 (ARB Jan. 30, 2004).

A complainant's failure to prove by a preponderance of the evidence any one of these elements requires dismissal of his complaint. 29 C.F.R. § 1982.104(e)(1). "If a complainant meets his burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected activity." *Rudolph v. Nat'l R.R. Passenger Corp. (Amtrak)*, ARB No. 11-037, 2009-FRS-015 (ARB Mar. 29, 2013).

DISCUSSION[27]

Timeliness

The parties agree and I find that the complaint was timely filed.

Railroad Carrier Engaged in Interstate Commerce

The parties agree and I find that Respondent qualifies as a railroad carrier engaged in interstate commerce within the meaning of the Act.[28]

Employee of Respondent

The parties agree and I find that Complainant was an employee of Respondent on the dates of the alleged protected activity.

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[27] While I recognize that the prima facie case analysis falls out when Complainant has established all of the elements by a preponderance of the evidence, I have left it in for ease in facilitating my final analysis.

[28] "Railroad carrier" is defined in 49 U.S.C. § 20102(3) as

> a person providing railroad transportation, except that, upon petition by a group of commonly controlled railroad carriers that the Secretary determines is operating within the United States as a single, integrated rail system, the Secretary may by order treat the group of railroad carriers as a single railroad carrier for purposes of one or more provisions of part A, subtitle V of this title and implementing regulations and order, subject to any appropriate conditions that the Secretary may impose.

"Railroad" is defined in § 20102(2) as

> (A) means any form of nonhighway ground transportation that runs on rails or electromagnetic guideways, including—
> (i) commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and
> (ii) high speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads; but
> (B) does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

Protected Activity

Protected activity has two elements: "(1) the information 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 subjective belief that a violation occurred must be objectively reasonable." *Blount v. Northwest Airlines Inc.*, ARB No. 09-120, ALJ No. 2007-AIR-009 (ARB Oct. 24, 2011). Complainant argues that he engaged in protected activity on February 13, 2011 when he objected to the hazardous safety condition created by Mr. Andrews' work assignments pursuant to 49 U.S.C. §§ 20109(a)(1)(C),[29] (b)(1)(A),[30] and assuming arguendo that Complainant refused an assignment, Complainant argues that he engaged in protected activity when he informed Mr. Andrews that he was not qualified to serve as an Employee-in-Charge/Foreman pursuant to § 20109(b).[31] Respondent agrees that Complainant's objection to Mr. Schlieper and Mr. Honeywood greasing switches

[29] 49 U.S.C. § 20109(a)(1)(c) provides

> (a) In General.— A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done—
>
> (1) 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, or gross fraud, waste, or abuse of Federal grants or other public funds intended to be used for railroad safety or security, if the information or assistance is provided to or an investigation stemming from the provided information is conducted by—
>
> (c) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct;

[30] 49 U.S.C. § 20109(b) provides

> (1) A railroad carrier engaged in interstate or foreign commerce, or an officer or employee of such a railroad carrier, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for
>
> (A) reporting, in good faith, a hazardous safety or security condition;

[31] 49 U.S.C. § 20109(b) provides

> (1) A railroad carrier engaged in interstate or foreign commerce, or an officer or employee of such a railroad carrier, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for—
>
> (B) refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties, if the conditions described in paragraph (2) exist; . . .
>
> (2) A refusal is protected under paragraph (1)(B) and (C) if—
>
> (A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;
>
> (B) a reasonable individual in the circumstances then confronting the employee would conclude that—
>
> (i) the hazardous condition presents an imminent danger of death or serious injury; and
>
> (ii) the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and
>
> (C) the employee, where possible, has notified the railroad carrier of the existence of the hazardous condition and the intention not to perform further work, or not to authorize the use of the hazardous equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced.
>
> (3) In this subsection, only paragraph (1)(A) shall apply to security personnel employed by a railroad carrier to protect individuals and property transported by railroad.

under watchman lookout protection is protected activity. However, Respondent asserts that Complainant's refusal argument is untimely, because Complainant raised it for the first time in his Prehearing Submissions dated June 11, 2012. Furthermore, Respondent argues that even if it was timely raised, Complainant still did not invoke concerns about his safety, there is no evidence that Complainant reasonably believed that performing his assigned duties presented an imminent danger of death or of serious injury, and Complainant failed to prove there was no reasonable alternative other than to work.

A complainant is required to file a complaint, "[w]ithin 180 days after an alleged violation of . . . FRSA occurs." 29 C.F.R. § 1982.103(d). The Board has held that "[w]hen issues not raised by the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." *Williams v. Am. Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-4 (ARB Dec. 29, 2010). Additionally, "[w]hile the ALJ rules allow for liberal amendment under 29 C.F.R. § 18.5(e)," where the new evidence would prejudice the respondent, such as where the "new post-hearing adverse action aris[es] under a different set of facts and occurrences than the matters in litigation," Complainant may not be allowed to supplement the pleadings.[32] *Hoffman v. NetJets Aviation, Inc.*, ARB No. 06-141, ALJ No. 2005-AIR-026 (ARB July 22, 2008). Although Complainant did not raise his refusal to work claim until his Prehearing Submissions, the new theory relied upon by Complainant is within the scope of his complaint. Specifically, Complainant's complaint includes the following factual summary,

> Mr. Mullen told Mr. Andrews that letting the new employees work without a foreman and with no orientation was dangerous. Mr. Andrews agreed and asked Mr. Mullen to be the foreman as he had been previously qualified as a foreman. Mr. Mullen declined because he felt he was not qualified any longer because of changes to the yard.

(ALJ EX I). Additionally, Respondent would not be prejudiced if Complainant were granted leave to amend his complaint, as Respondent has repeatedly argued Complainant was insubordinate on February 13, 2011 and the facts that give rise to the insubordination argument are the same facts that give rise to the refusal to work claim. Accordingly, Complainant is granted leave to amend his complaint to reflect the refusal to work claim.

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[32] The Code of Federal Regulations provides:

> If and whenever determination of a controversy on the merits will be facilitated thereby, the administrative law judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to complaints, answers, or other pleadings; provided, however, that a complaint may be amended once as a matter of right prior to the answer, and thereafter if the administrative law judge determines that the amendment is reasonably within the scope of the original complaint. When issues not raised by the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings, and such amendments may be made as necessary to make them conform to the evidence. The administrative law judge may, upon reasonable notice and such terms as are just, permit supplemental pleadings setting forth transactions, occurrences or events which have happened since the date of the pleadings and which are relevant to any of the issues involved.

29 C.F.R. § 18.5(e).

For the sake of judicial economy, I will address the merits of Complainant's refusal to work claim. As explained above, it is unclear from the evidence Complainant's motive for refusal. In the context of an environmental whistleblower case, the Board held that a complainant engages in protected activity "[w]here a complainant has a reasonable belief that the respondent is violating the environmental laws, other motives he or she may have had for engaging in protected activity are irrelevant." *Smith v. Western Sales & Testing*, ARB No. 02-080, ALJ No. 01-CAA-17 (ARB Mar. 31, 2004). Thus, even if Complainant refused to work because he would rather do the job he bid for, the fact that he raised a safety concern is sufficient. However, Complainant's refusal claim still fails, because Complainant has not met all of the statutory requirements to establish protected activity. Specifically, the evidence does not establish nor does Complainant argue that there was no reasonable alternative available, that the urgency of the situation did not allow for sufficient time to eliminate the danger, and that Complainant would not have refused the assignment had the condition been corrected immediately. Accordingly, Complainant has failed to prove by a preponderance of the evidence that his refusal on February 13, 2011 was within the purview of the Act.

Respondent agrees that complainant's objection to Mr. Schlieper and Mr. Honeywood greasing switches under watchman lookout protection is protected activity, and I find accordingly. Therefore, on February 13, 2011 and February 14, 2011, Complainant raised protected safety concerns pursuant to §§ 20109(a)(1)(C), (b)(1)(A).

Adverse Action

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." § 20109(a). Respondent took adverse against Complainant when Mr. McElroy removed Complainant from service on February 14, 2011. In addition, following the respondent's investigatory hearing, Respondent through the ruling of Mr. Webb took adverse action against Complainant by suspending him for thirty days as a result of the complainant's insubordination on February 13, 2011 and terminating Complainant as a result of evidence presented at complainant's investigatory hearing on April 15 and April 20, 2011 regarding the events of February 14, 2011. Complainant's counsel, in an offhand remark in his brief, opines that the agreement Complainant signed on May 5, 2011 in which he gave up his right to pursue a grievance for his termination under the collective bargaining agreement is a separate adverse action. I find that it is not. The standard for determining whether something is an adverse action is whether a reasonable employee in the same circumstances as the plaintiff would be dissuaded from engaging in protected activity. *See Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); *Williams v. American Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-4 (ARB Dec. 29, 2010). One of the considerations in determining whether an action is materially adverse is its effect on pay, terms, and privileges of employment. Other considerations include the permanency of the action, other consequences, and the context within which the action arises.[33] A reasonable employee would not be dissuaded from engaging in protected activity if an employer required employees terminated for engaging in protected

[33] *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 69 (2006) (finding "the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters").

activity to sign an agreement admitting fault and giving up the right to pursue grievance for termination under the collective bargaining agreement in order to be reinstated because not all employees who raise safety concerns are terminated, an employer is not required to offer a terminated employee reinstatement, and the employee could still file a complaint, like this complainant did, under the FRSA.

Employer's Knowledge of Protected Activity

The person taking the adverse action must be aware, or suspected, that the complainant engaged in protected activity.[34] The two people who took adverse action against Complainant were aware that Complainant engaged in protected activity. The first, Mr. McElroy, was present during the safety meeting on February 14, 2011 during which Complainant raised his safety concern and was aware of the accusation that Complainant was insubordinate and had refused an assignment on February 13, 2011. The second, Mr. Webb, conducted two investigatory hearings in which he heard testimony and viewed evidence relating to the February 13 and 14 accusations. Thus, both people responsible for taking adverse action against Complainant had direct knowledge that Complainant engaged in protected activity.

Causation and Respondent's Defense[35]

A complainant must establish by a preponderance of the evidence that the protected activity was a "contributing factor" in the retaliatory discrimination, not the sole or even predominant cause. *Araujo v. New Jersey Transit Rail Operations, Inc.*, No. 12-2148, __F.3d __, 2013 WL 600208 (3d Cir. 2013). The Court of Appeals for the Third Circuit explained "a contributing factor is any factor, which alone or in combination with other factors, tends to affect in *any way* the outcome of the decision." *Id.* (internal citation and quotation omitted). Furthermore, the Third Circuit provided the complainant "*need not* demonstrate the existence of a retaliatory motive on the part of the employee taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action." *Id.* (internal citation and quotation omitted); *see also DeFrancesco v. Union Railroad Co.*, ARB No. 10-114, ALJ No. 2009-FRS-9 (ARB Feb. 29, 2012). Both direct and circumstantial evidence may be used to establish the contributing factor element. *DeFrancesco,* ARB No. 10-114, ALJ No. 2009-FRS-9. "Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity." *Id.*

It is unclear whether Mr. McElroy considered complainant's alleged insubordination in his decision to remove Complainant from service, so I will assume that he did not.[36] (TR at 691-

[34] *See Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038 (Jan. 31, 2006); *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003 (Jan. 30, 2004).

[35] Three recent cases have clarified the law: *Araujo v. New Jersey Transit Rail Operations, Inc.*, No. 12-2148, __F.3d __, 2013 WL 600208 (3d Cir. 2013); *Henderson v. Wheeling & Lake Erie R.R.*, ARB No. 11-013, ALJ No. 2010-FRS-012 (ARB Oct. 26, 2012); and *DeFrancesco v. Union Railroad Co.*, ARB No. 10-114, ALJ No. 2009-FRS-9 (ARB Feb. 29, 2012).

93, 808-10). The evidence establishes that during the safety meeting on February 14, 2011, Complainant became increasingly loud and argumentative when he deemed the answer that no foreman was necessary for watchman lookout protection to be unacceptable. It escalated to the point of him saying "Fuck Safety." Thereafter, Complainant returned to his seat and Mr. McElroy removed him from the meeting. Outside, Complainant referred to Mr. Schlieper and Mr. Honeywood as "fucking idiots." The decision to remove Complainant from service was based on these facts alone. (TR at 691-93, 808-10).[37] In a case such as this where the manner in which Complainant raised his safety concerns is at issue, the reasons for removal from service and the safety concern are so inextricably intertwined, a presumptive inference of causation is created.[38] *See Henderson v. Wheeling & Lake Erie R.R.*, ARB No. 11-013, ALJ No. 2010-FRS-012 (ARB Oct. 26, 2012). Applying the liberal "but for" standard established in *DeFrancesco*, ARB No. 10-114 and reaffirmed in *Henderson*, ARB No. 11-013, I find Complainant would not have been removed from service, but for having raised his safety concerns. Accordingly, Complainant has established a prima facie case of retaliation.

Thus, the next issue is whether Respondent can prove by clear and convincing evidence that it would have removed Complainant from service absent Complainant raising safety concerns. As explained below, I find Respondent has managed to meet its heavy burden. Although the right to engage in statutorily protected activity permits some leeway for impulsive employee behavior, it must be balanced against an employer's right to maintain order and respect in its business by correcting subordinates. It is well-settled that "[t]he rights afforded to the employee are a shield against employer retaliation, not a sword with which one may threaten or curse supervisors." *Kahn v. Sec'y of Labor*, 64 F.3d 271 (7th Cir. 1995) (internal quotation omitted). Complainant allowed his frustration to get the better of him when he said "Fuck safety" during a safety meeting. Although Respondent admits its employees are not a bunch of "choir boys," Mr. McElroy testified why saying "Fuck safety" was so egregious,

> when he said, the 'fuck safety' part which to me, struck near because that's one of our --- I mean, we're having a safety meeting. Norfolk Southern bases its whole what we do everyday[sic] on safety and doing things safely and making sure the men have the right tools and right equipment while in training. That's one of our foundations especially in the engineering department is safety and when you blurt out an explicative[sic] like that toward a process that's near and dear to all of our hearts, that was the last straw for me.

(TR at 696). It would be contrary to the purpose of the whistleblower statute to find saying "Fuck safety" during a safety meeting was protected when the Act's purpose is " 'to promote

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[36] However, Mr. McElroy's decision to initiate disciplinary charges was based on his knowledge that Complainant refused to perform assigned duties on February 13, 2011 and that on February 14, 2011 Complainant disrupted a safety meeting using loud and offensive language, directed offensive language at co-workers, and threatened a supervisor. (RX 45, 46).

[37] Complainant did not approach Mr. Fleps and accuse him of lying until after he was informed he was removed from service. (TR at 647-48, 693-94).

[38] Unlike in *DeFrancesco* and *Henderson* where the employers were not aware of their employees' prohibited conduct until after the whistleblowers engaged in protected activity, in the instant case the protected activity and the activity giving rise to the charges were contemporaneous and Respondent had knowledge of both almost simultaneously.

safety in every area of railroad operations.' " *Araujo v. New Jersey Transit Rail Operations, Inc.*, No. 12-2148 (3d Cir. 2013) (citing 49 U.S.C. § 20101)). Such language strikes against the very essence of the Act and as Mr. McElroy recognized, it demeans the safety process and is especially offensive when used in a safety meeting. Furthermore, when deciding whether Complainant should be taken out of service immediately, Mr. McElroy correctly considered the escalating nature of Mr. Mullen's behavior, specifically, the fact that even after Complainant was removed from the meeting his outburst continued. (TR at 691-92). For the foregoing reasons, I find Employer has established by clear and convincing evidence that it removed Complainant from service not because of his safety concerns but rather the manner in which he raised them.

Additionally, applying the "but for" standard, I find Complainant would not have been suspended and terminated, but for having raised his safety concerns. Accordingly, Complainant has established a prima facie case of retaliation.

Complainant was suspended thirty days for his actions on February 13, 2011 and terminated for his actions on February 14, 2011. The ultimate decision to assess discipline was made by Mr. Webb after investigatory hearings that lasted a total of three days. He testified he has twenty-seven years of experience and extensively reviewed all of the evidence. (TR at 814-15). With respect to the insubordination charge, Mr. Webb like me credited the testimony of Mr. Andrews that he instructed Complainant to act as a foreman and Complainant refused. (TR at 816-17). Mr. Webb further found Complainant was qualified to act as a foreman and there was no corroborating testimony that Complainant objected saying he was unqualified. (TR at 817-19). Regarding the conduct unbecoming charge, Mr. Webb found a pattern of escalating behavior. (TR at 823-26). Mr. Webb provided that Complainant still frustrated with the events of the prior day, raised his concern during the safety meeting by asking an argumentative question, was given an adequate answer to address his safety concern, became louder and louder, said something to the effect of "F-it", accused Employer of taking short cuts on safety, and that Mr. McElroy correctly removed Complainant from the room. (TR at 823-25). Complainant then began insulting his coworkers and finally stepped towards Mr. Fleps shaking his finger in Mr. Fleps' face and called him a liar. (TR at 825). Mr. Webb provided there is a "difference between using [vulgar language] when you're in control and you're just making a comment versus really lashing out. The language itself is not the reason for what ultimately happened here. It's a continuity[sic]. It's a continuation and once there was a physically aggressive sign, then it's gone too far." (TR at 825-26). Mr. Webb assessed a thirty day suspension against Complainant for insubordination and determined a greater than thirty day suspension, the maximum allowed under the collective bargaining agreement, was warranted for the unbecoming charges. (*see* TR at 758). Consequently, Complainant was terminated. The facts as I found them are consistent with those found by Mr. Webb and only diverge slightly, though not significantly enough to be outcome determinative. In support of its argument that complainant's suspension and termination were reasonable, Employer introduced uncontroverted evidence that it had assessed the same level of discipline to employees who engaged in similar misconduct. (TR at 752-58). In one instance, the employee was terminated and later reinstated after nine months for telling a supervisor "You're crazy as hell" in front of other employees when that employee did not agree with how the supervisor was having other employees perform a task. (TR at 754-56). I find Employer has established by clear and convincing evidence that it

suspended and terminated complainant not because of his safety concerns but rather the manner in which he raised them.

In short, for the above mentioned reasons I find that Respondent has established by clear and convincing evidence that it removed Complainant from service and subsequently disciplined Complainant not because of his safety concerns but rather because of the grossly inappropriate manner in which he raised them.

CONCLUSIONS

Complainant established a prima facie case of retaliation. Complainant engaged in protected activity pursuant to §§ 20109(a)(1)(C), (b)(1)(A) when he raised safety concerns on February 13, 2011 and February 14, 2011. Complainant, however, was unable to establish by a preponderance of the evidence that his refusal was protected pursuant to § 20109(b). Respondent took adverse action against Complainant when Mr. McElroy removed Complainant from service and when Mr. Webb imposed a thirty-day suspension and termination following the investigatory hearings. Respondent had direct knowledge that Complainant engaged in protected activity. Complainant has established that his protected activity was a contributing factor in the retaliatory discrimination. Respondent, however, has proven by clear and convincing evidence that it would have taken the same unfavorable personnel actions in the absence of the complainant's protected activity.

ORDER

IT IS ORDERED THAT the complaint is DISMISSED.

Digitally signed by Richard Morgan
DN: CN=Richard Morgan,
OU=Administrative Law Judge, O=Office
of Administrative Law Judges,
L=Pittsburgh, S=PA, C=US
Location: Pittsburgh PA

RICHARD A. MORGAN
Administrative Law Judge

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

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the

Board receives it. *See* 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

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

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

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

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

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