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**Issue Date: 29 October 2013**

**CASE NO: 2012-FRS-74**

**IN THE MATTER OF**

**JONETTE D. NAGRA**

**Complainant**

**v.**

**NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)**

**Respondent**

**APPEARANCES:**

**CARISA GERMAN-ODEN, ESQ.**
**BENJAMIN B. SAUNDERS, ESQ.**
**JOSEPH M. MILLER, ESQ.**

**On Behalf of the Complainant**

**KATHERINE L. HOEKMAN, ESQ.**
**JONATHAN L. SNARE, ESQ.**

**On Behalf of the Respondent**

**BEFORE: C. RICHARD AVERY**
**Administrative Law Judge**

# DECISION AND ORDER

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

## PREFACE

The parties agree that Respondent is a railroad carrier within the meaning of the Act and Complainant was employed by Respondent within the meaning of the Act. Likewise, there is no issued over the fact that Complainant, while a locomotive engineer, was involved in an accident on May 31, 2009. The issues are whether or not Complainant suffered intentional adverse personnel action which is protected under the Act.

Complainant first attempted to return to work on January 5, 2012, after being medically released on December 29, 2011, and she alleges in not allowing her to reapply and take a physical, Respondent violated §§(a)(4) and (c)(2) of the Act. Respondent, on the other hand, maintains Complainant is estopped from returning to her former employment as a locomotive engineer with Respondent because she had once plead and stated in a previous FELA lawsuit that she was permanently and totally disabled.

A total of nine witnesses testified. Also, in evidence are seven (7) Administrative Exhibits, fifteen (15) Complainant's Exhibits and thirteen (13) Respondent's Exhibits. Following a two day trial, this opinion is based upon the entire record including post-trial briefs filed by both parties.

## OVERVIEW OF WITNESSES

### Dr. Donald Dietze

Dr. Donald Dietze testified at trial. He is a neurosurgeon who saw Complainant on June 8, 2009 for neck and back pain she suffered from her May 31, 2009, accident. He treated Complainant conservatively at first with physical therapy and steroid injections. When Complainant did not improve, Dr. Dietze performed cervical surgery on January 25, 2011. Throughout the first half of 2011, Dr. Dietze maintained Complainant was temporarily disabled, not at MMI and could not return to her job as an engineer. By the end of that year (2011), however, Complainant had so markedly improved that Dr. Dietze, after reviewing a job description, released Claimant to full duty on December 29, 2011.

### Complainant

Complainant testified that she started to work for Respondent in 1993 following fourteen years in the Army. She became a locomotive engineer in 2001 and to this date assumed she is still on the roster.

Following her May 31, 2009, accident Complainant filed an accident/injury report and saw Dr. Dietze for shoulder and neck pain. In January 2011 Complainant underwent surgery. Her third party FELA law suit against Amtrak was dismissed, and Respondent offered a settlement if Complainant would agree not to return to work. Complainant refused the offer and started in the fall of 2011 working in a convenient store she owned. In December 2011 Complainant took and passed a work physical administered by Concentra Clinic, the same clinic Respondent uses for return to work physicals. On December 29, 2011, Dr. Dietze after reviewing a locomotive engineer's job description, released Complainant to full duty.

Upon providing a medical release and requesting a return to work physical, Complainant was advised she would not be scheduled a physical because "it was a legal matter." No one ever told Complainant she was unfit for work, and she brings this action seeking back pay since January 2012 and return to work and punitive damages.

On cross-examination, Complainant acknowledged she had filed a FELA suit in 2010 (RX-9) and alleged permanent disability at that time, but maintained she is no longer disabled. That suit was ultimately dismissed.

**Scott Wright**

Scott Wright works for Respondent as a road foreman. He supervises ten engineers, one which had been Complainant. He explained that if an employee is off work thirty days or more, once released by the treating physician he/she must take a return to work physical if approved to do so by the medical department.

In this instance, Mr. Wright did not deny Complainant, who he had known for ten to fifteen years, had asked him about returning to work, but he did deny that he told her she was "unrehireable" and she should see a union rep. He testified he liked Complainant and said nothing negative about her. In fact he described her as never being a problem. He also confirmed that he himself had once filed a FELA suit alleging permanent disability and that it had not been a bar to his being re-employed and later promoted.

**Joseph Miciotto**

Joseph Miciotto is a locomotive engineer. His supervisor is Scott Wright. He was injured in 2000, filed a suit in 2003 where his lawyer alleged permanent disability and was re-hired in 2004. To re-hire he had to get a release from his doctor, send medical records to the Respondent, and undergo a physical at Concentra Clinic. Mr. Miciotto knows of no one being retaliated against for an injury if timely reported.

**Butch Williams**

Richard "Butch" Lee Williams is the Assistant Superintendent of Operations with Respondent, and he oversees Scott Wright. Like Mr. Wright, Mr. Williams explained if off over thirty (30) days an employee must get a doctor's release and then an approval from Respondent's medical department to take a return to work physical. Similar to Mr. Wright, Mr. Williams too had previously filed suit against Respondent alleging permanent disability, but as with Mr. Wright he too was returned to work. In this instance, Mr. Williams said he learned on January 5, 2012, Complainant was trying to "mark-up" (return to work) and he contacted the claims department who in turn referred the matter to the legal department. A letter was written (CX-11) by that department, but over Mr. Williams' signature denying Complainant's request. There was no medical review and no medical fitness standard was applied.

In addition to testifying during Complainant's case in chief, Mr. Williams was recalled by the Respondent. He repeated some of his earlier testimony and added he had known Complainant since 1994 or 1995 and she was a good engineer. Refusing to re-hire her was not his decision he said, nor did he provide any input. He admitted, however, he signed the letter refusing her return.

**Elaine Simmons**

Elaine Simmons testified by video deposition.[1] She was a claims representative for Respondent from April 18, 2010 to April 2012 and said she was terminated for whistleblowing for which she filed a sexual harassment suit. During her employment Ms. Simmons oversaw Complainant's claim file regarding the May 31, 2009 accident.

According to Ms. Simmons no one said Complainant was a bad employee, but management wanted her out, so they used her earlier alleged disability allegations as grounds. However Ms. Simmons says others have made similar allegations and been allowed to return to work.

In this instance e-mails from Respondent's in-house Counsel, Scott Morgan, and private Counsel, Kyle Gideon, according to Ms. Simmons show as early as September 2011 the decision was made to not allow Complainant to return to work. All of which occurred well before Ms. Lech's claimed final decision (CX-9). Ms. Simmons also testified that Wright and Williams played roles in the decision and neither liked Complainant, nor wanted her return. Wright said Complainant caused him too much paperwork.

According to Ms. Simmons, it was not Complainant's work performance that caused Wright not to want Complainant to return to work, rather it was the fact that she simply caused extra paperwork. As far as who made the ultimate decision regarding Complainant, Ms. Simmons testified she personally knows it was Brian Fitzpatrick, Parrish Gross, Darryl Butler, Kyle Gideon and David Scott Morgan. Ms. Lech was not involved in the process, and Respondent did not follow its own return to work procedure. The decision was made when the Court dismissed Complainant FELA complaint, well before the September e-mails, and well before Complainant sought to return to work. Allegedly, the decision was made because Complainant testified in her former trial deposition that she was totally disabled.

**Parrish Gross**

Parrish Gross is Director of claims and prior to that was manager of claims services. According to his testimony, the claims department investigates, evaluates and resolves claims, but has no authority over return to work issues. However, he knows of no retaliation against an employee for reporting an accident.

[1] Her direct to testimony was played in Court and her relevant cross-examination was set out in writing by the parties post-hearing.

As far as estoppel is concerned, Mr. Gross testified that comes about when an employee claims he/she is permanently disabled. He named instances the doctrine had been applied: The Complainant, Bob Arthur and Derrick Webb, all of whom had filed FELA complaints. Labor Relations decides these type cases, and Mr. Parrish does not know how the decision concerning Complainant was made, but he knows it was after her FELA case resolved and after Complainant tried to mark-up in the Fall of 2011; however, he acknowledged the September 2011 e-mails from Scott Morgan in the legal department indicated the decision had earlier been made (CX-3) as did Morgan's letter over Mr. Williams' signature. (CX-11). As far as medical fitness, Mr. Gross said he knew of nothing keeping the Complainant from returning to work. He also knew Mr. Morgan had advised Labor Relations of the estoppel doctrine.

**Nafeesah McKenith**

Nafeesah McKenith is a transitional work officer. She works with nurse case manager in light duty programs. Her goal is to make sure injured workers get medical care and work within their restrictions. She does not know who or what department decided Complainant could not return to work, but she is not aware of any retaliation for reporting an accident, but in this instance she knows of no medical reason Complainant could not have returned to work. Ms. McKenith was simply informed by Elaine Simmons it was a "legal decision."

**Lorranie Lech**

Lorraine Lech is Manager of Corporate Labor Relations. She has a law degree and has been involved with labor relations since 1980. She was told in the fall of 2011 Complainant could not "mark-up" because she had asserted she was permanently disabled. However, according to, Ms. Lech this was not a final decision at the time because Complainant had yet attempted to "mark-up". According to Ms. Lech, she made the final decision on January 20, 2012, relying on Complainant's previous allegations of disability as well as Dr. Dietze's much earlier letter releasing Complainant for light duty only. She also said she relied on information furnished by attorneys Morgan and Gideon.

Based on this information and the doctrine of estoppel, Ms. Lech claims she herself made the decision to not allow Complainant to return to work. Though not a "bright line" rule, she testified two other employees had been estopped from returning. In making her decision, however, she admittedly chose to disregard Dr. Dietze's December 29, 2011 letter wherein he had found Complainant fit to return as a locomotive engineer because she testified she found the letter to be "disingenuous."

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact and conclusions of law that follow are in part those proposed by the parties in their post-hearing briefs. Where I agreed with the summations, I adopted the statements rather than rephrasing the sentences. The facts and conclusions however, are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes, and case law. They are also based on my observation of the demeanor of the witnesses who testified at the hearing. Although perhaps not specially mentioned in this decision, each exhibit and argument of the parties has been reviewed and considered.

1. Complainant reported an injury on May 31, 2009 while working as an Amtrak locomotive engineer. At the time Complainant had been working for Respondent for 16 years.

2. On May 31, 2009, Scotty Wright was the Road Foreman of Engines and supervisor of the locomotive engineers working in the Southern Division.

3. On May 31, 2009, Butch Williams was Amtrak's Assistant Superintendent of Operations in the Southern Division and Mr. Wright's immediate supervisor.

4. At the time of Complainant's 2009 accident and injury, Scotty Wright and Butch Williams were her Amtrak supervisors.

5. In May 2009, Scotty Wright was aware that Complainant had sustained a personal injury and had reported that injury.

6. Butch Williams received a completed copy of Complainant's Employee Injury/Illness Report after her accident on May 31, 2009.

7. Complainant filed a lawsuit against Amtrak under the Federal Employers' Liability Act (FELA) for the personal injuries she sustained in the May 2009 accident, and that claim against Amtrak was dismissed by the Court in June 2011.

8. Amtrak offered Complainant a settlement in the FELA litigation but it required Complainant to give up her employment rights at Amtrak. Complainant turned down the settlement because she wanted to return to work.

9. Amtrak's return-to-work policy requires that employees who are out of work thirty (30) days or more have to take a return-to-work physical.

10. The first step in the return-to-work process at Amtrak is for the injured employee to get a release from the doctor stating that the employee is qualified to come back to work.

11. The employee would give the release to the Amtrak medical department and then the medical department would notify the employee's supervisor that the employee can proceed with a return-to-work physical.

12. The employee's supervisor would inform the employee that they were able to take the return-to-work physical.

13. The facility in New Orleans that is used by Amtrak for return-to-work physicals is Concentra.

14. Once the employee's physical is complete, Concentra sends the paperwork to the Amtrak medical department who notifies the employee's supervisor that the employee is released to come back to work.

15. In other words, once the employee passes the return-to-work physical, the employee is allowed to return back to work.

16. After Complainant's accident on May 31, 2009, she treated for her injuries with Dr. Donald Dietze at the North Institute in Lacombe, Louisiana.

17. Dr. Dietze is a board certified neurological surgeon.

18. Complainant treated with Dr. Dietze for her May 31, 2009 spinal injuries from June 8, 2009 through December 29, 2011.

19. Dr. Dietze initial treatment for Complainant injuries after the May 31, 2009 accident was conservative treatment through physical therapy, MRI scans, and a series of spinal injections into her neck. Eventually, at approximately 5-6 months post-treatment, because her symptoms persisted, surgery was recommended.

20. Throughout Dr. Dietze's experience with Complainant, she always wanted to get back to work.

21. The artificial disc replacement surgery was done in part because of Complainant's desire to return to her job as a locomotive engineer.

22. On April 30, 2011, approximately three months post-surgery, Dr. Dietze wrote a report concerning his treatment of Complainant at the request of counsel. At that time, Dr. Dietze recommended that Complainant not return to her work as a locomotive engineer because she was not yet at maximum medical improvement. The ultimate decision for her permanent work restrictions would be dependent on her recovery and would be made when she reached maximum medical improvement. At the time of the April 30, 2011 report, Dr. Dietze gave a projection of light duty.

23. Throughout his medical treatment of Complainant, Dr. Dietze filled out disability forms for Amtrak. He never marked on any disability form to Amtrak that Complainant was permanently disabled. Dr. Dietze always rated Complainant as totally, but temporarily disabled until he was able to release her to full duty without restrictions.

24. From the time that Dr. Dietze began treating Complainant until he released her to return to work as a locomotive engineer, he never listed her as permanently disabled.

25. Complainant discussed returning to work at Amtrak with Dr. Dietze at her last appointment with him on November 23, 2011; Dr. Dietze testified at this time that Complainant's spine, from a structural standpoint, was capable of performing the duties of a locomotive engineer. However, before making a final decision, Dr. Dietze wanted to review her job description.

26. Complainant provided Dr. Dietze with a job description. After he had the opportunity to review it, Dr. Dietze released her to return to work as a locomotive engineer without restrictions on December 29, 2011 and determined that she was at maximum medical improvement.

27. While out injured and treating with Dr. Dietze, Complainant was contacted by Amtrak Transitional Work Officer, Nafeesah McKenith, on behalf of Amtrak's "Right Care Day One" program.

28. Throughout Complainant's treatment with Dr. Dietze, Complainant received nine letters from McKenith advising of light duty work at Amtrak and requesting updated medical documentation from Complainant's treating physicians. Each letter sent by McKenith to Complainant or Complainant's counsel was copied to the claims department.

29. The last letter sent by McKenith to Complainant was December 16, 2010. This letter stated that Amtrak wanted to ensure that Complainant was receiving "the highest quality medical care and all the support necessary to recover from her injury and return safely to the workplace and her normal daily activities."

30. At the time of the December 16, 2010 letter, McKenith was still reaching out to Complainant to see if she could come back to work if she was able. At this time, Complainant had already engaged in litigation, had filed a lawsuit alleging permanent disability and had not been released to full duty. However, in January, 2012, when Complainant did not have a lawsuit, no longer had a disability and had been released to full duty, McKenith did not offer Complainant the "Right Care Day One" program.

31. McKenith was notified by Elaine Simmons in the claims department that a legal decision had been made that Complainant was not able to come back to work. McKenith testified she was not able to process the return to work for Complainant; it was beyond her control.

32. McKenith does not know of any Amtrak medical fitness standard or FRA medical fitness standard that was keeping Complainant from returning to work.

33. On January 5, 2012, Complainant attempted to go through the return-to-work steps at Amtrak to mark back up as a locomotive engineer after being released to full duty by Dr. Dietze on December 29, 2011.

34. Prior to commencing the process at Amtrak to return to work, Complainant had started working at Poche's Quick Stop in September 2011 to see if she was able to work and what she could do.

35. After working at the Quick Stop for a few months, Complainant felt ready to return to work as an engineer for Amtrak. Complainant took a physical exam at Concentra on December 23, 2011 and discussed her plans to return to work with Dr. Dietze.

36. At Concentra, Complainant was given a Department of Transportation physical for the State of Louisiana; the physical exam part of the DOT physical was similar to the locomotive engineer physical. She passed this physical on December 23, 2011 and received her release from Dr. Dietze on December 29, 2011.

37. When Complainant received her release from Dr. Dietze, she called Scotty Wright, her immediate supervisor, to tell him that she was released by her physician to return to work. Wright told her that she was "un-rehireable."

38. Complainant spoke with Sandra Wurst in the Amtrak medical department who told her to call Nafeesah McKenith, Amtrak transitional work officer.

39. Nafeesah McKenith told Complainant that she could not schedule her for a return-to-work physical because it was a legal matter and she needed to consult her attorney.

40. Complainant sent a letter on January 5, 2012 advising that she had made every attempt to mark-up and schedule a return-to-work physical and asked that Amtrak please schedule her return-to-work physical. She sent this letter to Scotty Wright, Butch Williams, Nafessah McKenith, Sandra Wurst, Scott Morgan, and her union representative, Mark Kenney. Complainant included a copy of her release from Dr. Dietze with the letter.

41. Complainant never received a response to her January 5, 2012 letter requesting a return-to-work physical.

42. Scotty Wright and Butch Williams came to Amtrak claims agent, Elaine Simmons, and congratulated her on zeroing out Complainant in her FELA lawsuit because they did not want her back at work.

43. On another occasion, prior to Complainant requesting to return to work, Scotty Wright and Butch Williams went to Simmons' office wanting to know what they needed to do to make sure that Complainant could not come back to work.

44. On September 21, 2011, an email was circulated by Kyle Gideon, outside counsel for Amtrak, to Scott Morgan, in-house counsel for Amtrak, regarding Complainant. Several individuals were copied on this e-mail, including individuals in the Amtrak claims department: Elaine Simmons, Darryl Butler, Brian Fitzpatrick, and Parrish Gross.

45. On September 21, 2011, Scott Morgan responded to Gideon's e-mail stating that "this is a case for estoppel" and noting to Steve Spindel, in Amtrak labor relations, that Morgan would "give you all the info you need."

46. The e-mail chain of September 21, 2011 was not the first discussion Simmons participated in about Complainant not being allowed to return to work. There had been ongoing discussions between Elaine Simmons, Darryl Butler, Brian Fitzpatrick, Parish Gross, and Scott Morgan that Complainant was not going to be allowed to return to work because she alleged permanent disability in her FELA litigation.

47. In a meeting before September 21, 2011, Brian Fitzpatrick, Parrish Gross, Darryl Butler and Scott Morgan along with input from Wright and Williams, made the decision that Complainant would not be allowed to return to work. The decision was reconfirmed and reiterated in the e-mails. Lorraine Lech was not involved in that process.

48. Scotty Wright spoke with Complainant in early January 2012 when she requested to come back to work and take her physical. Wright knew that Complainant had been released by her doctor when he spoke with her.

49. After speaking with Complainant, Scotty Wright informed his immediate supervisor, Butch Williams, that Complainant was requesting to mark back up for work and take a return to work physical.

50. Williams received Complainant's January 5, 2012 letter requesting to return to work and Dr. Dietze's release. In response to this letter, Williams contacted Parrish Gross in the claims department.

51. Williams did not respond to Complainant's January 5, 2012 letter requesting to return to work.

52. Williams received a subsequent letter on May 22, 2012 from Nagra's Union representative, Bob Demers, requesting that Complainant be scheduled for her physical re-examination.

53. Williams responded to Demers letter on May 30, 2012 after contacting Parrish Gross in the claims department. Williams' letter declined the request for a physical examination because "Ms. Nagra asserted, with the assistance of counsel and through the use of medical experts, that she was permanently disabled from her employment as an engineer."

54. Williams signed the letter but did not write the May 30, 2012 letter to Bob Demers. Scott Morgan in Amtrak's legal department wrote the letter.

55. Williams did not review any of the alleged medical expert testimony referred to in the letter. He also did not review the litigation documents referenced in the letter.

56. While working at Amtrak as a locomotive engineer, Williams filed a lawsuit in 1992 for personal injuries he sustained in an on-duty accident. In that lawsuit he alleged "severe, painful and disabling personal injuries of a permanent nature." The allegations in his lawsuit did not bar Williams from continuing to work at Amtrak and being promoted into a management position.

57. While working for Amtrak as a locomotive engineer, Scotty Wright also filed a lawsuit for personal injuries alleging permanently disabling injuries. As with Williams, it was not a bar to Wright's employment with Amtrak.

58. Joe Miciotto currently works as an Amtrak engineer and began his career with Amtrak in 1991. He filed a lawsuit for personal injuries alleging he sustained on-the-job in a train-track collision which occurred in 2000 while he was working as an Amtrak locomotive engineer.

59. After being injured in 2000 and alleging a permanent disability Miciotto treated with his doctor for the next four years. When his physician released him to return to work, the release was sent to the Amtrak medical department. Miciotto was allowed to take a physical at Concentra and Butch Williams notified him that he could come back to work. Miciotto returned to work at Amtrak as a locomotive engineer in 2004.

60. Williams and Wright were not aware of any Amtrak medical fitness standard or FRA medical fitness standard that would bar Complainant from returning to work as a locomotive engineer.

61. Lorraine Lech, Amtrak Corporate Labor Relations Manager and Amtrak's Corporate Representative at the hearing of this matter, maintained that she made the final decision that Complainant would not be allowed to return to work at Amtrak under the doctrine of estoppel.

62. According to Lech, the doctrine of estoppel "is when an employee asserts in litigation and to Amtrak that the employee is permanently disabled from working a position or never again able to work a position that the employee worked at the time they were injured, they are estopped from later providing completely contrary information that states that they can no work."

63. According to Lech's testimony, the basis of the estopped doctrine is that it is disingenuous to one day contend one thing and then shortly thereafter, eight months later, to have a completely totally opposite position.

64. The estoppel doctrine is not a bright-line rule according to Lech because "you need to review documents, you need to see what is it that an employee contended in their complaint to the court, what if any testimony was submitted by the employee or by the employee's experts, what type of documents, reports, that experts are using to support the fact that the employee is permanently disabled or can never work again in that position."

65. Lech has handled two other estoppel doctrine cases during her 33 year career at Amtrak. In one case, the *Hanslick* matter, the Plaintiff convinced a jury he was permanently disabled and was awarded compensation for a permanent disability. In the *Williams* matter, the railroad's medical director determined that Williams would not return to work because he could not perform all the functions of a conductor as set out in his job description.

66. All of the documents Lech relied on to make her decision were sent to her on January 23, 2012 by Scott Morgan (in-house counsel for Amtrak) who received the documents from Kyle Gideon (outside counsel for Amtrak).

67. Lech relied on dated material created in 2010 and 2011 to make her final decision to not allow Complainant to return to work after 16 years of service. Lech did not review Complainant's deposition testimony. Lech did not speak with Nafessah McKenith who was working with Complainant to return to work. Lech did not ask for any medical records to review.

68. To make her final decision to not allow Complainant to return to work at Amtrak, Lech relied on one medical record from The North Institute from Dr. Dietze dated April 30, 2011, a preliminary report from Dr. Pat Culbertson dated January 20, 2011, a confidential settlement letter dated May 4, 2011 and Complainant's FELA Complaint dated May 28, 2010.

69. Lech reviewed the December 29, 2011 release from Dr. Dietze for Complainant to return to work, but found Dr. Dietze's assessment that Complainant could return to full duty to be "disingenuous." She substituted her opinion for Dr. Dietze's under the doctrine of estoppel, although she testified that the doctrine of estoppel is not a bright-line rule.

70. Lech does not know whether there is an Amtrak medical fitness standard or an FRA medical fitness standard that is keeping Complainant from returning to work. Lech testified she made her decision based solely on the materials she received from the legal department.

71. According to Lech, Complainant is estopped from returning to work in any position at Amtrak and as such, there would be no light duty positions available to her even if she could not return to working as a locomotive engineer. Lech never spoke with anyone in the Amtrak medical department to determine whether Complainant had a disability preventing her from returning to work as a locomotive engineer.

72. Complainant engaged in protected activity under the Act when she reported her injury on May 31, 2009, and when she sought to be re-hired as an engineer on January 5, 2012.

73. Amtrak knew Complainant had engaged in these protected activities.

74. Complainant was subjected to an adverse personnel action when Amtrak refused to permit Complainant a return-to-work physical despite the recommendation of her treating physician.

75. The protected activities were a contributing factor in Amtrak's decision to not allow Complainant's return to work.

76. Complainant proved each of the elements of her claim by a preponderance of evidence.

77. Amtrak failed to meet its burden of showing by "clear and convincing evidence" that it would have refused to re-hire Complainant even if she had not engaged in protected activities.

78. Upon passing the physical, Complainant is entitled to reinstatement to her previous position with Amtrak with no loss of seniority since January 5, 2012.

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

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

## DISCUSSION

To prevail in a FRSA action, a complainant must establish by a preponderance of the evidence that: (1) she engaged in protected activity, as statutorily defined; (2) she suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the unfavorable personnel action. If a Complainant meets her burden of proof, the employer railroad 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.

Statutorily protected activity is defined in parts (a), (b), and (c) of 49 U.S.C.A. §20109. In this matter, section (a)(4) and (c)(2) have been violated by Amtrak.

Section (a)(4)
(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, denote, 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.

Obviously, Complainant reporting an injury in this instance was protected activity under Section (a)(4) of the Act. Not only did Complainant immediately notify Scotty Wright and Butch Williams and the claims department, but every other recipient of the September 2011 emails demonstrated knowledge of Complainant's May 31, 2009 train/truck collision and the medical treatment that followed. Notice was also set out in detail in the 2010 FELA lawsuit filed by Complainant and served upon Amtrak in 2010.

As far as Ms. Lech, the alleged "decision maker," is concerned I do not accept her role as such. It is farfetched to believe that she did not know of Complainant's accident when reviewing Complainant's return-to-work request and Ms. Lech herself acknowledged receipt of some of the early September 2011 e-mails applying estoppel as a bar to Complainant's returning to work.

In sum, Complainant's report of accident/injury constituted protected activity and the persons responsible for denying Complainant a return-to-work physical were aware of her protected activity. As to an unfavorable personnel action that, of course, was the denial of a return-to-work physical.

Lastly, to make out a *prima facie* case, Complainant's burden is to prove by a preponderance of evidence that Complainant's protected activity was a contributing factor in Amtrak's decision not to allow Complainant a return-to-work physical. Circumstantially, if not directly, I find Complainant has carried her burden.

In *John R. Hutton v. Union Pacific Railroad,* ARB No. 11-091, ALJ No. 2010-FRS-020 (ARB May 31, 2013) the Board discusses in detail "chain of events" and the reporting of an injury being "inextricably intertwine" with an unfavorable personnel action explaining that a "chain of event" may substantiate a finding of contributing factor. According to the Board "neither motive nor amicus is a requisite element of causation as long as protected activity-contributed in any way-even as a necessary link in a chain of events leading to adverse activity" In this instance, if Complainant had never engaged in protected activity the adverse or unfavorable personnel action would never have followed her. Consequently, considering the totality of the circumstances Complainant's protected activity was a contributing factor for the unfavorable personnel action she later suffered.

Once an employee demonstrates the protected activity was a contributing factor, the burden is on the employer to prove by clear and convincing evidence that it would have taken the same action absent employees protected activities.

Here, the only defense offered by the Respondent is the estoppel doctrine. Chosen to promote that defense was Lorraine Lech, Manager of Corporate Labor Relations. She testified that estoppel was not a bright-line rule and was one she has used only twice in her over thirty year career. In doing, she agreed she did not rely on Dr. Dietze's latest opinion releasing Complainant to return to work, for she considered the opinion "disingenuous."

I do not accept Ms. Lech's assertion that she was the decision maker in this instance. She testified she had, as early as September 2011, been told that Complainant would not be allowed to "mark-up" if she tried and that estoppel would be the reason. Ms. Simmons' testimony, that I do accept on the subject, said Ms. Lech played no role in the decision to prevent Complainant's return and that the decision was made much earlier by Brian Fitzpatrick, Parrish Gross, Daryl Butler, Scott Morgan and Kyle Gideon.

While there is no direct evidence as to why Complainant's return to work was denied, circumstantially it appears to be intertwined with the accident, her FELA lawsuit and her refusal to take a settlement which would have barred her return to work. The only reason advanced by Respondent was the Complainant was estopped because of her earlier medical records and her previous allegation she was disabled. That changed, however, with Dr. Dietze's December 29, 2011, letter and yet Respondent through its house counsel, private counsel and claims department chose to ignore Dr. Dietze in an obvious determined effort to prevent Complainant from returning to work. A punishment others such as Williams and Wright had not suffered as a result of their previous claims of disability. In sum, it is my finding that Respondent has failed in its burden to show it would have taken the same action absent Complainant's protected activity under Section (a)(4) of the Act.

Section (c)(2)

**Prompt medical attention.** –

**(2) Discipline.** —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, except that a railroad carrier's refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier's medical standards for fitness of duty. 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.[2]

Under Section (c)(2), "protected activity" includes following orders or a treatment plan of a treating physician when an employee attempts to follow her treating physician's orders and return to work following medical treatment. It is considered a violation of the Act if the railroad employer's refusal to return the employee to work is not based on FRA medical standards for fitness for duty or secondarily, the railroad carrier's medical standards for fitness of duty.

On March 29, 2013, the Administrative Review Board (hereinafter "ARB") issued a Decision and Order of Remand in the case of *Lawrence J. Rudolph v. National Railroad Passenger Corporation (Amtrak).* The ARB found that under (c)(2), attempting to return to work based on a treating physician's recommendation is an FRSA protected activity, and a carrier's refusal to permit an employee's return to work based on a physician's recommendation constitutes adverse employment action. The same facts as in this matter.

On December 28, 2011, Complainant's treating physician, Dr. Dietze released Complainant to return to work as a locomotive engineer without restrictions. Despite Dr. Dietze's recommendation, however, when Complainant attempted to "mark-up" and schedule a return-to-work physical she was denied her request by a letter signed by Butch Williams but written by Scott Morgan, of Amtrak's legal department, on the grounds she was permanently disabled. This denial was an adverse action under the Act.

When an employee seeks to return to work based on his or her treating physician's recommendation, a covered employer's refusal to allow the employee to return to work constitutes discipline in violation of §20109(c)(2) unless the employer's refusal is based on FRA medical standards for fitness for duty or secondarily, the railroad carrier's medical standards for fitness for duty.

In this instance there was no FRA medical fitness standard or Amtrak medical fitness standard that prevented Complainant from returning to work. In other words, Amtrak has no legal defense to the adverse action taken under Section (a)(2) of the Act.

[2] Because not plead specifically in the original complaint, prior to trial Amtrak sought to strike Complainant's assertion that Amtrak violated §20109(c)(2) of the Act. I denied the motion. The pleadings, which require no specific form, provided sufficient notice that the suit was being brought under the Act. Also, there was ample time pre-hearing to exercise discovery.

Respondent failed to avoid liability in this matter because it failed to provide any evidence that there is an Amtrak medical fitness standard or FRA medical fitness standard keeping Complainant from returning to work as required under section (c)(2) of the Act. Further Respondent has failed to provide any evidence that Complainant's personal injury reporting did not in some way contribute to the discrimination and discipline allegedly imposed by Lech under the doctrine of estoppel. In Ms. Lech's word, a defense I find "disingenuous."

## DAMAGES

### Reinstatement

The Administrative Review Board has held that it is proper to examine the legitimacy of an employer's reasons for taking adverse personnel action in the course of concluding whether a Complainant has proved by a preponderance of the evidence that protected activity contributed to the adverse action. *Bruce v. Horizon Air Industries,Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8, slip op. at 14 (ARB Jan. 31, 2006) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Proof that an employer's explanation is unworthy of credence is persuasive evidence of retaliation because once the employer's justification has been eliminated, retaliation may be the most likely alternative explanation for an adverse action. *See Florek v. Eastern Air Central, Inc.*, ARB No. 07—113, ALJ No. 2006-AIR-9, slip op. at 7-8 (ARB May 21, 2009) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 33, 147-48 (2000).

Although I find Amtrak has no legal defense sufficient to deny Complainant relief, in the absence of an FRA medical fitness physical I am unwilling to order immediate re-instatement . What I do order is that within 30 days of this Decision and Order Amtrak shall provide Complainant the return-to-work physical which she has been requesting since January 5, 2012. Assuming she passes the physical, within 30 days thereafter Complainant shall be reinstated and with the exception of back wages Complainant will be re-instated in her previous position with Respondent as a locomotive engineer with no loss of seniority or benefits (except back pay) since January 5, 2012.

### Back Wage

As to the back wages, I agree with Respondent that Complainant made no good faith, diligent effort to mitigate her damages in that regard. The Complainant speaks Spanish and has worked in healthcare and transportation industries, but since Dr. Dietze found her fit to return to her job she has never sought gainful employment. Earlier, Complainant attempted to operate a convenient store, but received no compensation. Once reinstated, Complainant, as previously set out, will be entitled to her seniority and benefits since January 5, 2012, but no back pay.

**Punitive Damages**

Punitive damages are to punish unlawful conduct and to deter its repetition. *BMW v. Gore*, 517 U.S. 559, 568 (1996). Relevant factors when determining whether to assess punitive damages and in what amount include: 1) the degree of the defendant's reprehensibility or culpability, 2) the relationship between the penalty and the harm to the victim caused by the respondent's actions, and 3) the sanctions imposed in other cases for comparable misconduct. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 523 U.S. 424, 434-35 (2001). Punitive damages are appropriate in whistleblower cases to punish wanton or reckless conduct and to deter such conduct in the future. *Anderson v. Amtrak*, 2009-FRS-00003, slip op. at 26 (Aug. 26, 2010), *citing Johnson v. Old Dominion Security*, 86-CAA-3/4/5 (May 29, 1991).

I find Respondent, has demonstrated indifference to the legal rights of Complainant under the Act. As a result, I find punitive damages are appropriate to correct and deter this conduct. I assess punitive damages in the amount of $35,000.00.

**Attorney's Fees and Costs**

Lastly, Complainant is entitled to reasonable costs, expenses and attorney fees incurred in connection with the prosecution of his complaint. 49 U.S.C. § 20109(e)(2)(C). Counsel for Complainant has not submitted a fee petition detailing the work performed, the time spent on such work or his hourly rate for performing such work. Therefore, Counsel for Complainant is granted ten (10) days from the date of this Decision and Order within which to file and serve a fully supported application for fees, costs and expenses. Thereafter, Respondent shall have ten (10) days from receipt of the application within which to file any opposition thereto.

## ORDER

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

1. Within 30 days of the date of this Order Respondent shall provide Complainant the return-to-work FRA medical fitness physical Complainant has requested since January 5, 2012, and assuming Complainant passes the physical within 30 days thereafter Complainant shall be returned to work and with the exception of back wages Complainant shall be reinstated to her previous position with Respondent as a locomotive engineer with no loss of seniority or other benefits (except back pay) since January 5, 2012.

2. Respondent will pay Complainant $35,000.00 in punitive damages.

3. Counsel for Complainant shall have ten (10) days from the date of the Decision and Order within which to file a fully supported application for fees, costs and expenses. Thereafter, Respondent shall have ten (10) days from receipt of the fee application within which to file any opposition thereto.

**So ORDERED** this 29th day of October, 2013, at Covington, Louisiana.

Digitally signed by C. Richard Avery
DN: CN=C. Richard Avery,
OU=Administrative Law Judge, O=Office
of Administrative Law Judges,
L=Covington, S=LA, C=US
Location: Covington LA

**C. RICHARD AVERY**
**Administrative Law Judge**

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

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

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

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

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

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

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

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