U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 22 April 2013

CASE NO.: 2012-FRS-39

IN THE MATTER OF:

LONNIE SMITH

Complainant

v.

UNION PACIFIC RAILROAD COMPANY and STEVEN WILSON

Respondents

APPEARANCES:

KARL FRISINGER, ESQ.

For the Complainant

JEFFREY J. DEVASHRAYEE, ESQ.
RAMI S. HANASH, ESQ.

For the Respondents

BEFORE: LEE J. ROMERO, JR.
Administrative law Judge

DECISION AND ORDER

This proceeding arises pursuant to a complaint alleging violations under the employee protective provisions of the Federal Rail Safety Act (FRSA), 49 U.S.C. § 20109, as amended by

Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. Law No. 110-53. The employee protection provisions of the FRSA are designed to safeguard railroad employees who engage in certain protected activities related to railroad safety from retaliatory discipline or discrimination by their employer.

I. PROCEDURAL BACKGROUND

Lonnie Smith (Complainant) filed a complaint with the Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor on August 10, 2009, alleging that on May 7, 2009, Union Pacific Railroad Company (herein Union Pacific) and Steven Wilson, an individual, violated Section 20109 of the FRSA by denying, delaying and interfering with medical treatment of Complainant and thereafter disciplining and/or threatening discipline to Complainant for requesting medical treatment. Complainant alleged that he requested, but was denied medical treatment. It is further alleged that thereafter, Complainant was threatened with discipline and has been discriminated against and harassed since returning to work. (ALJX-1).

The Secretary of Labor, acting through the Regional Administrator for OSHA, investigated the complaint. The "Secretary's Findings" were issued on March 14, 2012. OSHA determined that Complainant engaged in protected activity on May 7, 2009, when he reported to Respondent Wilson that he was too sick to continue working safely. It was determined that Respondent had knowledge of Complainant's protected activity since he reported his concerns to a Respondent official. It was further decided that Respondents' response to Complainant's complaint was to intimidate and threaten him and to imply that Complainant would have a "target on his back" unless he continued to work. Thus, Complainant continued to work for a number of hours thereafter and completed his full shift. It was also determined that Respondents then failed to promptly retrieve Complainant from his locomotive despite knowing Complainant had reported he was severely ill and needed medical attention. The Secretary further determined that a reasonable worker might well be dissuaded from reporting that they could

not safely continue their shift and thus Complainant was subjected to an adverse action by Respondents' actions. (ALJX-2).

The Secretary also resolved that Complainant's protected activity was a contributing factor in the adverse actions and there was a strong temporal proximity between the protected activity and the adverse actions together with evidence that Respondent acted with discriminatory animus. The Secretary fashioned a Preliminary Order providing for punitive damages, compensatory damages, restoration of leave, attorneys' fees and a Notice Posting to Employees. (ALJX-2).

On April 16, 2012, Respondents filed their objections to the Secretary's findings and requested a formal hearing before the Office of Administrative Law Judges (OALJ). (ALJX-3).

A **de novo** hearing was held in Pocatello, Idaho on September 17, 18 and 19, 2012. The following exhibits were received into evidence: Complainant's Exhibits (CX-1-8, and 10-16)[1]; Respondents' Exhibits (RX-1-17); and Administrative Law Judge Exhibits (ALJX-1-8).[2]

II. UNDISPUTED FACTS

Pursuant to the Pre-Hearing Order issued by the undersigned in this matter, Complainant filed a comprehensive Complaint (ALJX-5) to which Respondent filed an Answer (ALJX-6). The pleadings have been joined and the following facts are not in dispute:

1. At all times material, Complainant worked as a locomotive engineer for the Union Pacific out of the Pocatello, Idaho terminal.

[1] CX-9 was withdrawn.

[2] References to the record are as follows: Trial Transcript: (Tr.___); Complainant's Exhibits: (CX-___); Respondents' Exhibits: (RX-___); and Administrative Law Judge Exhibits: (ALJX-___). Additionally, references to the post-hearing briefs are as follows: Complainant's Post-Hearing Brief, Comp. brief at ___; and Respondents' Post-Hearing Brief, Resp. brief at ___.

2. At all times material, Union Pacific was a railroad carrier within the meaning of 49 U.S.C. §§ 20109 and 20102.

3. At all times material, Respondent Union Pacific was engaged in interstate commerce within the meaning of 49 U.S.C. § 20109.

4. On May 7, 2009, Complainant was working as a locomotive engineer on train OGRT4-06, which left out of Green River, WY at 2:30 a.m. and he was operating the train to his home terminal in Pocatello, ID.

5. Mr. Scott Paul was the conductor on this train.

III. SUMMARY OF THE EVIDENCE

Testimonial Evidence

Complainant

Complainant testified at the formal hearing and was deposed by the parties on July 11, 2012. (RX-16). He is currently employed by Respondent Union Pacific Railroad Company and has been so employed since March 2004. He is a locomotive engineer and has a home terminal at Pocatello, Idaho. (Tr. 32).

On May 7, 2009, he was working the extra-board. On May 5, 2009, he departed Pocatello, Idaho, at 2200 hours en route to Green River, Wyoming. When his trip began, he stated he felt fine. When he arrived in Green River at 0500 am, he felt tired and had a stuffy nose. On May 6, 2009, he went to a hotel and rested for 12-15 hours. (Tr. 33). On May 7, 2009, he was called at 0230 am for the return trip to Pocatello, Idaho. He testified that physically he felt fine, refreshed and "felt wonderful when he went to work."[3] (Tr. 34).

[3] Union representative Millward understood from Complainant that he was suffering from an illness upon reporting to work. (Tr. 197-198).

He testified that as his trip progressed, the sun came up and he began getting a migraine headache and felt nauseous. (Tr. 34). In a normal trip, he experienced vibration from the motors and radio noise in the locomotive cab, but he stated the vibration and noise contributed to his headache becoming worse and not feeling well. His headache got progressively worse. (Tr. 35). He described his symptoms as starting with a migraine headache, and as the sun light started to come up he felt pressure behind his left eye, had a severe bloody nose, was light-headed and gagging and puking. His vision towards the end of the shift was becoming blurred. (Tr. 36).

Scott Paul was the locomotive conductor. Complainant and Paul notified the railroad yardmaster (Griff) by radio that the locomotive engineer (Complainant) had become sick throughout the trip and needed to get off the train to seek medical treatment.[4] The yardmaster responded to "standby at Cheyenne Street," where the locomotive had already been stopped, and he would "get a hold of a manager." Complainant and Paul waited for 40 minutes without any response or relief. (Tr. 37). Paul radioed the yardmaster again who responded that a manager will meet the locomotive at the "208 crossing," or "One Spot Crossing," but no manager was present upon the arrival of the locomotive. Respondent Wilson arrived ten to 15 minutes later. (Tr. 38).

Complainant testified that when Wilson boarded the train he asked "what's going on?" Complainant was seated and Wilson stood in front of him. Wilson used a "very stern and threatening voice." (Tr. 40). Paul was present throughout the encounter. Complainant responded that he was sick, and needed to get off the train, and "wanted to go to the hospital or go see somebody, just get off the train, that I didn't feel well."[5] (Tr. 38).

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[4] Union Pacific argues neither Complainant nor Paul reported a "work-related illness" to the yardmaster. Resp. Brief at 3.

[5] Union Pacific also argues Complainant did not request Form 52032 at any time to report a work-related illness and no such report has ever been filed. Resp. Brief at 3. Given the extant circumstances, I find Complainant's verbal report to the yardmaster and manager Wilson was sufficient to place Union Pacific on notice that he was ill and needed medical treatment.

Complainant testified that Wilson went on a tirade and stated that "shit was going to hit the fan if I laid off." Complainant testified that Wilson "basically threatened me, harassed me, then asked me what my decision was, if it was going to be safe to move the train." Complainant responded that he "made his decision back at Cheyenne Street when I requested to get off the train, that it wasn't safe." Wilson responded that Jeff Moore (Superintendent) will hear about this and "shit was going to hit the fan." Complainant then stated "well, if it's going to cost me my job, I guess I have no other choice. I guess I'll continue to do the work." Wilson then asked Complainant "do you feel it's safe," to which Complainant responded "no, I do not. I told you that. But I guess if it's my job, I'll continue to work." Wilson then radioed the yardmaster that the "crew is going to continue to work until their hours of service was up." (Tr. 39). Complainant testified Wilson did not ask if he needed medical treatment. (Tr. 45). When Wilson left the train, Complainant opened the locomotive window and vomited out the window. (Tr. 40).

Complainant and Paul continued on and separated the train in the Pocatello yard. They were not able to complete all work tasks because they ran out of their 12-hours of service and their shift ended. (Tr. 41-42). There were other managers present in the yard where they were working: Manager of Train Operations Jeffrey Trappett; Dave Denny and Jerry Lundquist were watching the train. (Tr. 42). They worked one hour and 45 minutes to two hours after Wilson got off the train. (Tr. 43). Complainant testified that at one point, before their hours of service expired, the train was secured, but had to be unsecured. The train was not secured when their shift ended and they had to be relieved. (Tr. 43). The three managers just drove off after Complainant and Paul's hours expired. They had to wait an additional 40 minutes before they were relieved by another crew. (Tr. 44).

Once relieved, Complainant was bused to the Union Pacific depot in Pocatello. (Tr. 44). He went to Nurse Susan Norby's office. (Tr. 45). Nurse Norby took his blood pressure,

temperature and called the infirmary or dispensary which was nearby, because she was concerned about how red his eye was and how high his blood pressure was, to ascertain if a doctor was present, but none was present. Nurse Norby instructed Complainant to drive to an emergency care facility and let her know what treatment was administered. (Tr. 46). Complainant drove to the Portneuf Medical Urgent Care Center in Pocatello, Idaho. The nurses at the Urgent Care Center took his blood pressure and temperature. The attending doctor administered two injections, one for his migraine headache and one for his nausea.[6] The Urgent Care Center medical staff did not want him to drive. (Tr. 47-48; CX-11). A friend was called and drove Complainant home. (Tr. 48). Complainant testified that he did not believe he had a common cold or flu and was not told by the medical staff that he had a cold. (Tr. 49).

Complainant testified that he did not fill out an incident report because he had been threatened and harassed by Wilson, but had made a verbal report to Wilson. He did not think it made any "sense in risking his job anymore." (Tr. 47).

After the May 7, 2009 incident, Complainant was notified to attend a meeting with Cameron Scott, a Vice-President for Respondent, where Conductor Paul and three to four union representatives were also present. (Tr. 50-51). Scott asked Complainant to explain the events of the incident. Paul also spoke at the meeting. (Tr. 51). Scott apologized to Complainant and stated that the situation was not handled properly by Complainant or Wilson. Complainant also attended a second meeting with Jeff Moore, Superintendent over the Pocatello Service Unit, and Wilson, manager of train operations. Moore wanted to "brush everything under the rug," "get it settled so we could all get on with things." Moore asked Wilson to apologize to Complainant. (Tr. 52). Wilson stated he was under stress that day and did apologize, but Complainant did not believe Wilson's apology was sincere. Wilson commented that he

[6] It is noted that the medical records reveal Complainant provided a history of suffering from headaches and sinus-related symptoms for ten days for which he had been taking Keflex.

did not know why he had to apologize because Moore had sent him to do what he did. (Tr. 53).

Complainant testified that after the incident he was "bird-dogged" or followed by supervisors and managers. He recalled one occasion when he was told by a friend, George Millward, the local union chairman, that two white UP (Union Pacific) jeeps followed him when he was headed to Dillon, Montana. (Tr. 54-55). Complainant did not observe the two white UP jeeps. (Tr. 55). Complainant checked his FTX testing records and there was a reported test by manager Cranor on June 18, 2009, but manager C. T. Cranor did not board the train and he was not de-briefed if it was a recorded test. (Tr. 56).

Field Training Exercises (FTX) are conducted by Respondent which are structured tests to enhance training. (Tr. 59). Complainant recalled C. T. Cranor conducting a FTX, but did not debrief the crew. Bosh conducted a FTX and did de-brief the crew. Complainant claims he had three FTXs on an unknown date, perhaps July 8, 2009, at Glens Ferry which were never entered into the computer. (Tr. 60). Complainant identified CX-14 as a listing of Union Pacific FTXs from January 23, 2009 to April 10, 2010. CX-15 demonstrates FTXs from October 23, 2009 to October 7, 2010, before and after the May 7, 2009 incident. (Tr. 61-62).

Complainant also claims there was testing performed which was not entered into the computer. (Tr. 61). He further claims CX-14 and CX-15 do not reflect his true work history. However, Complainant did not otherwise provide specific testing dates, times or supportive documents. (Tr. 62-64).

Complainant testified that the May 7, 2009 incident was stressful. Respondent Union Pacific had emphasized that employment was a "career not a job," but the incident caused him to lose sleep and become paranoid about the incident and he had to take time off. (Tr. 64-65). CX-12 is Complainant's work history beginning on May 1, 2009 through October 4, 2009. (CX-12, pp. 1-20). His work history preceding the incident from January 1, 2009 to March 18, 2009, is reflected in CX-12, pp.

21-27. (Tr. 65). Complainant is claiming 16 days of lost wages commencing on May 8, 2009, as a result of the May 7, 2009 incident.

On May 8, 2009, Complainant was in "layoff" status and took personal leave. (Tr. 66; CX-12, p. 1). From May 9, 2009 to May 13, 2009, he was "bumped" or displaced by a more senior employee, during which time he would have had to take vacation, lay off sick or take personal leave, if not bumped. (Tr. 67-68). Complainant testified he took a day of vacation on May 25, 2009, because he could not sleep because of stress from the incident, but did not go to a doctor. (Tr. 68-69; CX-12, p. 3). The assigned work for that day was "YPC," a yard job which would have paid $200-$300.00. (Tr. 80; CX-12, p. 3). Complainant testified that he was not having symptoms from his sinus infection on May 25, 2009, but "was pretty screwed up mentally from thinking why would somebody want to play God and decide whether I need medical attention or whether I should live or die basically . . . why would somebody threaten me when I say . . . 'I'm sick, I need off the train?' It starts messing with your head." (Tr. 69). He returned to an ability to work on May 27, 2009, and actually returned to work on May 28, 2009. (Tr. 70-71).

Complainant testified he was in "layoff" or personal leave status on June 11, 2009, because of stress from the incident, but did not seek professional or medical counseling at any time. (Tr. 71-73). Complainant did not seek formal or medical counseling at any time after the incident because that was "just the way [he] was brought up and everything." (Tr. 73). Although he was paid for his personal leave, the payment amount was $140.00 per day, whereas had he been able to perform work he would have made $430.00 for the missed "MROHK" job assignment. (Tr. 72, 80; CX-12, p. 4). On June 16, 2009, he met with Cameron Scott and was compensated for the day and carried in an "other service" status. (Tr. 73). On June 20, 2009, Complainant was in a "layoff" status because he could not sleep after meeting with Scott and missed a "LCP39" job which paid about $300.00. (Tr. 80; CX-12, p. 5).

On June 24, 2009, Complainant was placed in a "voluntary involvement, VIO" status for his meeting with Superintendent Moore and manager Wilson, and was paid for a basic day of about $220.00. (Tr. 74, 80). He was also carried as "VIO" on June 28, 2009, but was uncertain why because he was on a trip to Green River, Wyoming. (CX-12, p. 5). He also claims to have missed a "DA," dead head job which paid $600.00-$700.00 on June 24, 2009. (Tr. 80).

On July 2, 2009, Complainant was carried as on "other business" for the union. (Tr. 75; CX-12, p. 6). On July 5, 2009, Complainant took personal leave because he had enough of meetings and worrying over the incident, and missed a PCHKB job which paid $600.00-$700.00. (Tr. 75, 80-81; CX-12, p. 7). On July 12, 2009, Complainant took a vacation day and was carried as "VIO" on July 14, 2009. (Tr. 75-76). On July 12, 2009, he missed a "YPC," a yard job, which paid $100.00. (Tr. 81). He was off work for three days from July 16, 2009 through July 18, 2009, on vacation and sick leave. (Tr. 76; CX-12, p. 8). If he had worked on July 16, 2009, he would have been assigned a "MROHK" changing job which paid $600.00 (Tr. 81); and an "ABACL" changing job on July 17, 2009, which paid $600.00. (Tr. 81-82). On July 19, 2009, Complainant would have been assigned a "ZKCPD" changing job which paid $600.00. (Tr. 82; CX-12, p. 8).

From August 14 through 16, 2009, Complainant was on sick leave for 48 hours and missed a "MHKPC" changing job which paid $600.00 (Tr. 82); a "ZSEMN" job on August 15, 2009, which paid $600.00 (Tr. 82); and a "MNPPT" job on August 16, 2009, which paid $600.00 (Tr. 83). (CX-12, p. 12). On September 16, 2009, Complainant was again on sick leave and missed a "KGZBR" job which paid $600.00. (Tr. 76; CX-12, p. 16). On September 17, 2009, he took a vacation day and missed a "CTSSB9" job (Tr. 83). He was on sick leave on October 3, 2009, and missed a "GSGFTH" job which paid $300.00. (Tr. 76, 83; CX-12, pp. 17, 19-20).

During the three month period before the May 7, 2009 incident, Complainant took sick leave on February 4, 2009, and a personal leave day on March 6, 2009. (Tr. 77; CX-12, pp. 23, 26).

Complainant testified that he would have made more money if he had worked on the days he took sick or vacation leave. For example, according to Complainant, on May 8, 2009, the assignment for that day was "WCYWFZ," a work train which would have paid $600.00 round trip. (Tr. 79).

On cross-examination, Complainant confirmed that he felt wonderful when he started his trip from Green River on May 7, 2009. (Tr. 84-85). He had a slight stuffy nose while in Green River from May 5 to May 7, 2009. He testified that when he showed up for work, "[he] felt fine. When [he] got off work, [he] was sick." (Tr. 85). He testified that during the return trip on May 7, 2009, he developed a headache, which got worse as the sun started to rise. (Tr. 85-86). He acknowledged that he was deposed on July 11, 2012. He deposed that his headache worsen throughout the trip "as the sun continued to rise and lights got brighter and stress from being up all night." He did not depose "anything about the locomotive contributing to [his] sickness." (Tr. 88). Complainant also testified in his deposition that he believed his illness was work-related and was "induced or caused to be worse by the atmosphere in the locomotive cab." (Tr. 89). He further stated in deposition that the cab atmosphere that would cause him to have a migraine "were diesel fumes . . . just everything, not feeling good as to being sick." (Tr. 90). He acknowledged that he had an eye infection when he got off work. (Tr. 93).

Complainant affirmed that he was familiar with and trained on the General Code of Operating Rules, G-Core, and that there was a prescribed form to be completed to report injury and illness. (Tr. 98-99; RX-1). He identified RX-2 as Union Pacific Form 52032, Report of Personal Injury or Illness. (Tr. 100). Complainant testified that he verbally reported his illness to manager Wilson, but did not complete the required form. He deposed that he was never offered the form to be completed, but there was no excuse for not completing the form. (Tr. 100). He affirmed he was not claiming an occupational **injury** and did not know if he had an occupational illness. (Tr. 102). He confirmed that he became sick at work with symptoms of

a headache, nausea, dizziness, and blurred vision throughout the trip. (Tr. 102-103). He stated the blurred vision began at about Topaz and his dizziness began about 20 to 25 miles before Topaz. However, he continued to operate the train. The train was stopped at Topaz and Complainant confirmed that Conductor Paul asked if he could get the train safely to Pocatello, another 20 miles into town, and he did take the train the rest of the way to Pocatello. (Tr. 103).

Complainant testified that manager Wilson boarded the train at mile marker 208. He does not know what Conductor Paul saw or heard. He told Wilson that he was dizzy and had blurred vision. He later told Nurse Norby that he was dizzy, had blurred vision, and a bloody nose.[7] (Tr. 104). Complainant testified they waited for 40 minutes at road crossing 211, Cheyenne Street, but did not know the reason for the delay. He only knew they were told a manager would be right there. (Tr. 104-105).

Complainant agreed that Wilson asked him if he could continue working safely as an engineer. Wilson never stated Complainant would be fired if he left to go to the doctor or home, but that Complainant was "not going to like what's going to happen." Wilson also told Complainant "shit is going to hit the fan." Complainant did not recall Wilson stating that "you don't want to have a target on your back," but the comment was said to him. (Tr. 105-106). Complainant stated he vomited out the locomotive window as Wilson was leaving the train, but did not know if Wilson knew he vomited. He stated he continued to work because he was ordered to work. (Tr. 107).

He affirmed that when he observed two Union Pacific managers watching him, they did not interfere with his job performance and he did not have any conversations with them at any time. (Tr. 107).

[7] Nurse Norby denied any report of such symptoms by Complainant.

Complainant affirmed that there was a 40-minute time delay from the time his hours expired and he was relieved by the next crew, but he did not know why it took 40 minutes to be relieved. (Tr. 108).

He stated that when he visited with Nurse Norby, she stated the way his eye looked and with his blood pressure as high as it was, he "could possibly be having a stroke." Norby did not ask him if he felt well enough to drive himself safely to an urgent care center. (Tr. 109). He and George Millward met with Nurse Norby after their meeting with Scott, but he did not say a word to Nurse Norby. (Tr. 112).

At the meeting with Cameron Scott, Scott stated "it was unacceptable for a Union Pacific employee to be treated like that." Scott apologized for the company for what had occurred and stated the situation was not handled like it could have been. A second meeting was held where Superintendent Moore apologized to Complainant and Wilson apologized "somewhat." (Tr. 114). Wilson stated he was under a lot of stress that day. There was a lot going on in the Pocatello yard that day. (Tr. 114). There were trains on all three tracks into and out of Pocatello. Wilson also stated he did not know "why he was having to apologize when Mr. Moore was the one that sent him down there to do what he did." (Tr. 115).

Regarding Complainant's "bird-dogging" allegation, he acknowledged that he passed the FTX administered by Cranor and did not fail any test. (Tr. 116-117; CX-14, p. 8). He stated he had a right to be debriefed or sign paperwork of such FTXs. He stated "anytime you are involved in a testing event, you should be debriefed, good, positive, negative." (Tr. 117-118). His allegation of increased FTXs is based on his personal observations. He stated Wilson did not test him or, to his knowledge, order such testing. He did not know if Mr. Moore increased testing on him. (Tr. 118). He further stated he "could testify" that he was tested any more or less than other locomotive engineers in the service unit were tested. (Tr. 119). However, he did not have access to the test results of all 178 active engineers. He stated his employee review score

decreased, but his overall score was 989 out of 1,000 after the May 7, 2009 incident. (Tr. 120; RX-15).

Complainant agreed that his diagnosis from the Urgent Care Center attending physician was sinus infection (sinusitis) with cephalgia (headache). (Tr. 122-123; RX-9, p. 3). Complainant never went to a psychologist or psychiatrist and only went to the doctor on one occasion. He is claiming having missed work for 16 days because of the May 7, 2009 incident. (Tr. 124, 126). The days were compensated but he stated he took time off to overcome the trauma/stress caused by the incident which went into the month of October 2009. He took ten to 12 days off after he received apologies from Scott, Moore and Wilson. (Tr. 126).

Complainant confirmed that he was not charged with a rule violation and received no discipline for the incident. (Tr. 127). He testified he was "threatened basically with my job." He deposed that he was threatened, but "not with discipline." (Tr. 128). He stated his benefits and terms of employment are the same. (Tr. 128).

On re-direct examination, Complainant testified that his duties as a locomotive engineer include operation of the "locomotive from point A to point B, basically maintain speed, braking, stop the train." He affirmed that the Federal Railway Act requires certain vision to see the signals. After the incident, when he was off, he "sat in [his] house, stewed, worried." Before the incident, he hunted and fished. After the incident, he did not hunt or fish. (Tr. 130).

The Urgent Care Center doctor did not tell him of his diagnosis. (Tr. 131). He thought Wilson was intimidating when he stated "shit was going to hit the fan," telling him the superintendent was going to find out about it, talking to him like he was a "nobody" and threatening he would have a "target on his back." (Tr. 132). He stated there was a difference between a formal upgrade or discipline in relation to the G-Core rules and basically being threatened. (Tr. 132).

On re-cross examination, Complainant confirmed that he was not tested for his vision at the Urgent Care Center after the incident. (Tr. 132).

Richard Scott Paul

Paul testified that he is employed by Respondent Union Pacific Railroad as a conductor. (Tr. 134). His duties involve completing paperwork, aligning work events from point A to point B, and taking control of the train. (Tr. 135).

On May 7, 2009, Paul was the conductor on a train bound for Pocatello, Idaho from Green River, Wyoming. Complainant was the locomotive engineer on the train. Paul was in and out of the locomotive cab, but was in the cab the majority of the time. (Tr. 135). He could observe Complainant who was on the right side of the cab at the control compartment of the motor while Paul was on the left. Complainant's physical appearance was "fine" from Pocatello, Idaho to Green River, Wyoming. (Tr. 136).

Paul testified that there was nothing out of the ordinary about Complainant's physical appearance on May 7, 2009, when the work day began. (Tr. 136). Complainant told Paul he was feeling "shitty" about one-half of the way through the return trip to Pocatello. When daylight came, Complainant was pale, sweating, coughing and blowing his nose; something was wrong. His symptoms seemed to get worse throughout the trip. (Tr. 137). Complainant began complaining of headaches which became worse as the trip went on, blurred vision problems, coughing and closer to the end of the trip Paul noticed symptoms of a bloody nose. (Tr. 138). He could observe bloody kleenex in the clear waste bags on board the train. (Tr. 138).

Paul notified the railroad of Complainant's illness by calling the yardmaster by radio prior to reaching Cheyenne Street that he had a sick engineer who needed to be taken off the train. (Tr. 139). Paul testified Complainant also told the yardmaster "they'd have to get somebody else, that he was ill and needed to be taken off the train." The yardmaster

instructed Paul and Complainant to bring the train to crossing 208 or One Spot Crossing. Paul thought the yardmaster's instructions were odd because he had been told twice of Complainant's illness, yet they were told to go to crossing 208. He thought once the train reached the 208 crossing, "the ill man would get off the train." (Tr. 139). Thirty to forty minutes later, the yardmaster called and wanted to know if they had started work; Paul told the yardmaster "no, the engineer was sick and he needs to be taken off the train." Paul was told to "standby and we'll have a manager contact you." (Tr. 140).

Later, manager Wilson boarded the train and started talking first to Complainant. Wilson stated "Ok Lonnie, what's going on?" (Tr. 140). Complainant told Wilson he was sick and "I don't feel like I can do this work." Paul testified Wilson got "festered up," raised his voice and stated "if you're going home now, you're looking at being fired or at the very least, a target on your back," and, if this work does not get done, "shit is going to hit the fan." (Tr. 141). Wilson then asked Complainant, "tell me, what's it going to be?" Complainant responded "as I told you, I'm sick. I don't feel like I can do the job safely, but I do not want a target on my back, and I don't want to be fired, so I guess I'll stay here." Paul stated Wilson took "that to suffice, that yeah, we were going to stay until everything was handled," and then left the train. (Tr. 141). Complainant, who was still clammy, pale, sweaty and "it was obvious he was sick," opened the cab window and threw up outside the window. Paul testified he never heard Wilson ask if Complainant needed medical treatment. (Tr. 142).

Complainant described his symptoms to Wilson that he was sick, had a headache, nausea, "separate things like that," and mentioned his blurred vision, his headache was getting worse with a bloody nose. (Tr. 142-143). Complainant also informed Wilson that he could not do the job safely. Paul stated he thought Wilson would be more compassionate, but Wilson was aggressive and more intent on getting the work done than having any compassion for the sick, ill individual. Paul testified that Complainant stated Wilson looked right at him and saw him throw up out the locomotive window. (Tr. 143).

Paul testified that they proceeded into the yard and secured the rear portion of the train, made a cut and Complainant pulled forward to pick up DPU power in the middle of the train. (Tr. 144). Paul told Complainant to secure the power and he would be up to get him and they would go back to get the DPUs. Trappet, the yardmaster, must have been listening on the radio and stated "that's not how we do things," and to "unsecure it [the train]." Paul testified that Complainant could have got off the train once secured and walked to the depot to see the nurse or doctor. (Tr. 145). Paul testified Trappet was "bird-dogging" the train. Trappet was driving along-side the train and sitting in his car near the train when Paul told Trappet "this man is sick, he needs to be taken off the train." (Tr. 147). Trappet "said nothing." At that point, the train was unsecure, their work hours had expired but they could not leave the train until relieved. (Tr. 147). Paul stated it was 45-50 minutes later before they were relieved from the train. (Tr. 148).

Paul testified that the train could have been secured at the "one stop," but was then secured before Trappet told them to back up; a bus was there to pick them up. Complainant could have been taken off the train then or when he secured the head end next to the depot. When the train crew relieved them, they got on the bus and drove to the depot. Complainant told Paul he went to the nurse. Paul asked about Complainant's condition, but the nurse responded that she could not answer his questions. (Tr. 150).

Paul attended a meeting with Cameron Scott along with Complainant and a few union representatives. Scott was conducting a fact-finding meeting in Paul's opinion and sincerely apologized for the actions of company representatives. Paul explained to Scott what he observed happen on May 7, 2009. (Tr. 151).

Paul also attended a meeting with Superintendent Moore and manager Wilson along with Complainant and a few union representatives. Moore also sincerely apologized for the

company's actions and stated "that's not how he expects his managers to act or react to situations like this." Wilson also apologized, but his apology was not as genuine or very sincere since Moore asked Wilson to apologize. (Tr. 152).

On cross-examination, Paul testified that he did not know when Complainant first got sick. Complainant had vision issues, but he did not tell the yardmaster about Complainant's vision issues. (Tr. 153-154). Paul confirmed that his concern about Complainant's vision issues was more that he needed medical help, as opposed to actually his ability to operate the train. (Tr. 154). Paul testified he did not recall if Complainant complained about the locomotive noise or fumes making him sick. (Tr. 154-155). Paul did not know why it took 40 minutes before Wilson showed up at the train. He affirmed that Wilson stated to Complainant "if you go home, you're looking at being fired, or at the very least, a target on your back." (Tr. 156).

Paul testified that Complainant repeated he did not want a target on his back, but Wilson first mentioned Complainant would have a target on his back. Paul testified Complainant wanted to go home right away. (Tr. 157, 162-163, 174). Paul testified that if Wilson had offered Complainant medical treatment, Complainant would have taken him up on the medical treatment immediately. (Tr. 162). Complainant told Wilson about some of his symptoms. In his written statement, Paul acknowledged that he did not remember if Complainant told Wilson about his symptoms, but they "talked a little." Paul testified it was so obvious that Complainant was sick. (Tr. 164). Paul further stated that he did not recall the details of the discussion about Complainant's symptoms. (Tr. 165).

Paul testified he did not remember if Wilson asked Complainant if it was safe for him to continue working. (Tr. 165).

When the train was in the yard, Trappet drove Paul to the head of the train and told him "there should be a bus to come and get you." Paul stated it was unusual for a crew to take 40 minutes to relieve them in the yard. (Tr. 168). He stated

their federal hours of work were up and they had to wait for 50 minutes to get off the train. (Tr. 169).

Paul testified that he has worked with Complainant two or three times since the May 7, 2009 incident, and he seems to be doing fine in his career. (Tr. 172-174).

George Millward

Millward is presently retired but worked for Respondent Union Pacific Railroad for 38 years. He was a locomotive engineer. (Tr. 176). He was a local and International union officer for the United Transportation Union from 1981 to 2012. (Tr. 177).

On May 7, 2009, Complainant contacted him by telephone about an incident where he got sick on a trip. The incident involved a manager of Respondent. (Tr. 177). He instructed Complainant to write the information down. (Tr. 178). Millward had a private meeting with Superintendent Moore about the incident, but was not satisfied with Moore's attitude towards the incident. He asked Moore what happened with Smith being sick. Moore stated he was not going to start an epidemic for workers to claim they were sick to get out of work. (Tr. 178-179).

Complainant later brought a letter to Millward and he went over the information with Complainant. (Tr. 179; CX-13). Complainant's statement was hand-written and was received one week after the incident. (Tr. 180). Millward testified he had never seen such an incident before "where someone was denied, that was sick, getting off of a train." (Tr. 180-181). He called Paul, the conductor, and verified the facts were all true. Millward filed a complaint with the General Chairman on May 18, 2009, and attached Complainant's hand-written statement to the complaint. (Tr. 181-182; RX-6). He also sent an e-mail to President Young and Superintendent Moore of the Union Pacific Railroad. (Tr. 182-183).

Millward attended a meeting with Cameron Scott at which Complainant, Paul and three or four union representatives were in attendance. (Tr. 185). Complainant and Paul both stated in a pre-meeting with Millward that Millward's letter and Complainant's written statement were true. (Tr. 184). Scott mentioned that President Young was concerned about Millward's letter and was very regretful that an incident like this had happened and Young wanted an investigation. (Tr. 185). Scott was apologetic during the meeting. Scott stated that such an incident would not happen again. (Tr. 186).

Millward testified that Scott requested Smith and Millward speak with Nurse Norby because she felt Millward had made a personal attack on her in his letter. (Tr. 186). Millward and Complainant spoke with Nurse Susan Norby who he felt had not done her job professionally since she sent Complainant to drive himself to the emergency room. (Tr. 186-187).

Millward also met with President Young who asked how the meetings went. Millward told Young the apologies offered were not very sincere. (Tr. 188-189).

Millward also attended a meeting with Superintendent Moore, Wilson and Complainant. Moore apologized to Complainant and stated such an incident would not happen again. (Tr. 189). Moore told Wilson it was his turn to apologize. Wilson stated if he had to apologize, he would, but he did not do anything that Moore is the one who instructed him to do it. Millward accepted Wilson's apology with sincerity. (Tr. 190).

Later, Complainant called Millward and related that he felt he was being harassed and tested a lot and had a target on his back. (Tr. 190-191). Millward testified on one occasion near his home he saw Complainant working as an engineer on a train with manager Cranor following on one side and another manager on the other side of the train. Millward called Complainant's cell phone to advise him that he was presently being tested. (Tr. 191-192). Millward stated it was unusual, he had never seen a test like this done before with two managers, one on each side of the train. (Tr. 194).

On cross-examination, Millward testified his duties as a union representative were to protect the employees with issues like job security. (Tr. 195). He served as local chairman of the union from 2004 to 2010. (Tr. 195). He identified his complaint as RX-6 wherein he stated that "while in Green River, [Complainant] became sick with a severe migraine headache and reported he spent most of his 18 hour layover attempting to recover from this illness . . . but was feeling much better and was sure he could complete the trip." (Tr. 197-198). Millward agreed Complainant was pretty ill before he boarded the train to Pocatello. (Tr. 195).

In the meeting with Scott, Scott went over Millward's letter and wanted to know what he could do to make Complainant feel better about the whole situation. Complainant stated he just wanted an apology and the target off his back. Scott stated "there will not be a target on your back and shit will not hit the fan." (Tr. 200). Scott was sincere and apologized for the behavior of the railroad. (Tr. 200). Scott stated the situation could have been handled better. (Tr. 201). In the meeting with Moore, Moore also apologized but his apology was not sincere. Wilson apologized for his part in the incident. (Tr. 202).

Complainant serves as Secretary/Treasurer of the local union. (Tr. 203).

John Berrett

Berrett has worked for Union Pacific since January 2004. He is a train service engineer. He lived with Complainant from 2008 to 2011. (Tr. 207).

In May 2009, he recalled Complainant told him he was at the hospital because he was sick. He and Complainant do not work side-by-side as engineers. After the May 2009 incident, Complainant was like a "lump on the couch" for about two to three months. (Tr. 208). Complainant used to sleep in his room, but then he was on the couch and was different. Before

the incident, he and Complainant would go out to eat, have drinks and hang out with friends. After the incident, they did not do so. As time went on, things got better. Complainant was a little depressed and in a slump for two to three months. (Tr. 209-210).

On cross-examination, Berrett testified that when he saw Complainant on May 7, 2009, he did not look well. (Tr. 210). Complainant stated his blood pressure was "sky high" and he went to a doctor. Berrett stated he thinks Complainant went to the doctor only one time. (Tr. 211).

He testified that for the next two to three months, Complainant acted differently. He could not say the May 2009 incident caused Complainant's funk, but that is what he thinks. (Tr. 211). His perception was Complainant became anxious and depressed. He did not know if Complainant sought counseling. (Tr. 212). He did not know how much work Complainant missed, but Complainant was working less after the incident. (Tr. 212).

Stephen Wilson

Wilson worked as a Senior Terminal Manager in Pocatello, Idaho for Union Pacific for six years. He is currently on medical disability. (Tr. 214).

In May 2009, he held the same job with supervisory instructions on train movements and the authority to stop trains and unsafe practices in violation of the Federal Railway Safety rules and regulations. He had the authority to remove or place Complainant on a train. (Tr. 214-215).

He learned that Complainant was sick from yardmaster Griff who needed a manager to meet with Complainant at "211." When Wilson boarded the train on which Complainant was working, Complainant related that he was sick the night before, "didn't know if it was from diner food or what," and took the train even though he was ill. Complainant told Wilson he called the dispatcher and reported he wasn't feeling well. The dispatcher informed him that he would have green lights all the way to

Pocatello, meaning there was no heavy traffic out there. (Tr. 215-216).

Wilson asked Complainant what kind of illness he had, if he had the "bird flu," however Complainant stated he did not know what he had. (Tr. 216). Wilson testified that Complainant's train needed to get into the yard because the train behind him needed to get into the yard also and another train in the departure yard needed to depart. Complainant needed to get out of the way. (Tr. 217).

Initially, the train was at the 211 crossing and Wilson asked Griff to tell Complainant to pull up to the 208 crossing. Wilson was unable to locate a direct supervisor of engineers to go out and check on Complainant. (Tr. 218). He spoke with Superintendent Moore and reported Complainant was sick and wanted to go home, but had three hours of work left. Moore told Wilson to "go take care of it." Moore had previously asked Wilson to stay in his office because of the train traffic in the yard. Wilson testified he asked Moore for permission to go out to see about Complainant because there was so much going on in the yard that day. (Tr. 220).

In his deposition, Wilson confirmed that he asked Complainant "if he had gotten feeling worse as it went on. And he said somewhat." (Tr. 221). Complainant was on duty for nine hours and had three hours more to work. (Tr. 219).

Wilson affirmed that when he was on the train with Complainant he told Complainant that "shit would hit the fan" if they did not "get these trains moving," because Complainant's train was the "lynch pin for all the rest of the train movement" and his train had to go in. (Tr. 221). Wilson stated he asked Complainant if he wanted to go see the nurse, go to the dispensary or to a doctor; Complainant stated "no, he just wanted to go home." (Tr. 221).

Wilson testified he wanted to make sure Complainant could do the work. He observed Complainant who was pale, but he did not smell vomit, and didn't see him sweating profusely.

Complainant stated "he was not going to the doctor." Wilson testified Complainant "refused me to go to the doctor. He refused me to take him to the hospital." He told Complainant that "if he was not going to the doctor, he was not going to get off the train. If you're sick, you're going to go to the doctor. And if you're not sick or if you're well enough to take this train, then you need to take this train." (Tr. 222). He acknowledged that as he left the train, he heard a sound when the window opened. He inspected the ground below the window and there was no vomit. He concluded Complainant was being a "smart-alec." (Tr. 223).

He deposed that he thought it was "fishy" that Complainant called in sick. He thought Complainant was trying to "gum-up" the Pocatello yard. He stated he was shocked when he heard Complainant did not finish the work in the yard even though he worked to the end of his shift. (Tr. 224).

Wilson confirmed the yard was congested and Complainant's train was blocking the yard. Wilson had a lot of pressure on him to move trains in and out of the Pocatello yard. (Tr. 224-225).

In his deposition, Wilson stated Complainant reported he had blurry vision in Topaz, but when he got to Pocatello, he had to get off the train. (Tr. 226). He further deposed that Complainant refused medical care. He did not expect that because Complainant started in Green River, that he should finish until completion just because he came to work. (Tr. 227).

Wilson agreed that engineers have Federal Railway Administration (FRA) regulations which require them to meet vision and hearing standards. (Tr. 229). Wilson affirmed if an engineer is dizzy and has blurred vision, he should not operate a train. (Tr. 229). However, Complainant did not tell Wilson he was dizzy or had blurred vision. (Tr. 230). Wilson confirmed he would hope that it would be a FRA violation to operate a train with blurred vision. (Tr. 231).

Wilson testified that the reason he apologized to Complainant was because he was asked to do so by Superintendent Moore and Cameron Scott. (Tr. 232). He stated the train crew had three hours left when the train reached crossing 211. Wilson testified Complainant wasted 1.5 hours by reporting he was ill. (Tr. 233).

Wilson testified he felt he was disciplined because of the incident from suggestions and criticisms made to him by Cameron Scott and Superintendent Moore. (Tr. 233).

On cross-examination, Wilson testified that Complainant's train was on the only track in and out of Pocatello at that time. (Tr. 234). There was a major renovation project going on in the yard for tracks and ties, road crossings torn out which added to the problem when the Form Bs, portable structures defining limits, were out "because maintenance of way will work on the main track where trains are allowed on the main track working." (Tr. 234). Wilson had nine trains out there not moving. (Tr. 235).

Regarding the incident with Complainant, Wilson testified that when he boarded the train he asked "what was going on?" Complainant appeared pale. Wilson commented "you look like you're a little under the weather." (Tr. 235). He asked Complainant if he had the "bird flu." Wilson stated "if, you're that sick, you probably should just stop the train and tell them you need to get off the train." He did not hear any complaints about blurred vision. (Tr. 235-236). Complainant told Wilson he was throwing up. Wilson stated "why do you want to bring your train to the doorstep and dump it and make it a problem in a terminal that is teetering on the edge every day." He told Complainant "what is unacceptable about this is you could've told the dispatcher or get a hold of somebody so you could've made sure we got an engineer that we could put on your train when you got to Pocatello." He stated he had no other engineer to put on the train. (Tr. 236).

He told Complainant that he was not going to let him go home sick "until after you go see a doctor. If you want to go

to the doctor, if you want to go to see the hospital if you want to go see the nurse, then you know, tie your train down and let's go." (Tr. 236). Complainant did not inform Wilson that he was dizzy or had a bloody nose or blurred vision. (Tr. 236-237). Complainant told Wilson he was sick before he boarded his train in Green River. Wilson testified that Complainant did not ask for medical attention or to see a doctor. Wilson stated he offered the nurse, dispensary and emergency room and Complainant refused all three. (Tr. 237).

Wilson admitted he told Complainant "shit was going to hit the fan" because of the pressure and stress of all the trains. He explained he had "all these crews that were on duty waiting to move, for [Complainant's] train to get out of the way." Wilson stated his comment had nothing to do with what might happen to Complainant if he stopped working, but "it was just that the yard was just going to blow up." (Tr. 237-238). He testified he did not tell Complainant he would have a target on his back; rather Complainant stated he did not want a target on his back. He told Complainant he did not say "you're going to get a target on your back. All I'm asking you is if you're well enough to go, take this train and get it in and go to work and do it. And if you want to tell me that you can't do it because you're too sick to do it, get in the bus." (Tr. 238). He also asked Complainant if the locomotive and the trip had anything to do with his illness and Complainant stated "no, it did not." (Tr. 238).

Wilson testified he was not in Complainant's face during the discussion and was not yelling at him. (Tr. 238). He asked Complainant if he could continue working safely and Complainant stated "yes." Wilson thought Complainant was "yanking his chain." (Tr. 240). Complainant could have gotten off the train to go to the doctor and left with Wilson. (Tr. 240).

At the meeting conducted by Assistant Vice-President of Operations Cameron Scott, Scott asked Wilson to apologize to Complainant and he agreed to do so. (Tr. 242). He thought his apology was sincere. He did not remember qualifying his apology by stating that he did not know why he was apologizing. (Tr.

243). After his apology, Complainant asked "does this mean we can still sue?" (Tr. 244).

He affirmed that it took 45 minutes for the bus to reach Complainant after his work hours expired because of the yard situation with renovation and the location of the train blocking crossing 208. Crossings were torn out. Wilson did not know what route the bus took to get to the train. (Tr. 245-246).

On re-direct examination, Wilson testified Complainant did not fill out an incident report. (Tr. 247). Wilson stated a FRA illness occurs "while an employee is on duty from a specific cause of environment, equipment or personnel." He acknowledged that contrary to the dispatcher guidance Complainant did not have green lights all the way to Pocatello. (Tr. 249).

On re-cross examination, Wilson confirmed that the busses or vans are contracted and Respondent Union Pacific does not control the vans or its routes. (Tr. 250-251). Under FRA Rule 1.2.5 if an employee is claiming an occupational illness, the employee must complete a prescribed incident form. (Tr. 251). An occupational illness in Wilson's view is something like "breathing diesel fumes and getting a headache or over long-term exposure to diesel fumes or could be asbestos." (Tr. 252).

Wilson affirmed that if Complainant was sick when he boarded the train in Green River and his illness worsened to the point of needing relief because he did not feel he could operate the train, the Respondent would consider that to be a safety factor. Yet, if Complainant was sick, Wilson offered to take him to the doctor, but he refused. (Tr. 256). Wilson then inquired if Complainant could safely operate the train to which he responded he could and, according to Wilson, had done so for nine hours. (Tr. 255).

Bryan Rowe

Rowe works for Union Pacific and is Director of Safety Reporting and Compliance. (Tr. 266-267). He has held his position for six years. His duties are to insure Union Pacific

complies with 49 C.F.R. Part 225, accident incident reporting under the Federal Railway Administration regulations. He stated under 49 C.F.R. Part 225 Union Pacific is required to report to the FRA if an engineer is injured or becomes ill on duty, but no report is required to OSHA. (Tr. 267).

He stated a "reportable" FRA injury or occupational illness is one that meets the criteria for "work-related" and the employee would have to receive medical treatment above first-aid and lose work time. The definition for "work-related" is found at 49 C.F.R. Part 225, which he uses to determine if an incident is work-related and reportable. (Tr. 268; CX-4, pp. 1-2). There, "work-related means related to an event or exposure occurring within the work environment. An injury or illness is **presumed work-related if an event or exposure occurring in the work environment** is a discernible cause of the resulting condition **or a discernible cause of a significant aggravation to a pre-existing injury or illness**. The causal event or exposure need not be peculiarly occupational so long as it occurs at work." (Tr. 272, 273, 275; CX-3). However, "discernible" is not defined in the Code of Federal Regulations, but is defined in the FRA reporting guide according to Rowe in "a couple of sentences" as "something that one can understand or see that something happened to cause something to happen, or to cause something to be aggravated." (Tr. 275, 281). He added "it could be perceived by a person if there is an event or an activity that caused something." Rowe agreed that the work event or exposure needs only to be one of the discernible causes and does not need to be the sole or predominant cause. (Tr. 276).

The FRA Guide For Preparing Accident/Incident Reports at CX-5 dated May 1, 2003, was in effect in May 2009. (Tr. 277). "Work-related" is discussed at Chapter 2, page 16 of the FRA Guide and is defined as "related to any incident, activity, exposure, or the like occurring within the work environment." (CX-5, p. 2). A determination of "work-relatedness" is discussed in Chapter 6, page 6. Rowe testified "work-relatedness" is presumed for injuries and illnesses occurring in the work environment unless an exception specifically applies."

(Tr. 277). The Guide describes "significantly aggravated" as an event or exposure in the work environment which results in one or more days away from work that otherwise would not have occurred but for the occupational event or exposure or medical treatment in a case where no medical treatment was needed before the workplace event or exposure or a change in medical treatment was necessitated by the workplace event or exposure. (Tr. 278; CX-5, p. 7). Rowe testified that there still needs to be a discernible event and an illness. (Tr. 278, 281). A personal illness can be work-related, but still needs a discernible cause, i.e., **caused by work or significantly aggravated by the work environment**. (Tr. 279).

Rowe testified that an illness is much more challenging to determine than an acute injury; whether it is work-related or whether it is a pre-existing condition. (Tr. 282). Rowe opined that "if a locomotive cab, the noise, the smell, if there's nothing different than there is every other day and a person is maybe more susceptible to the sunlight, to the noise in the locomotive, just as if I had an illness and I stayed home and I had to shut the shades because the sun was bothering me, I don't believe that the OSHA or the FRA would want to have something like that as a reportable work-related injury when someone's illness becomes worse because of standard, normal things like that." (Tr. 283). Rowe testified he would have to examine whether the illness was "either caused by the work that day, or was it significantly aggravated by the work that day. Did the person maybe have the issue maybe before they came to work and the illness just progressively became worse, as is the normal case with many personal illnesses." He added, with an illness, did the work environment really contribute to the symptoms getting worse. (Tr. 283-284).

Rowe agreed that the fact a condition was caused by outside factors does not affect whether or not the incident needs to be reported and the exposure can be outside of the employer's control and still be work-related. (Tr. 285).

On cross-examination, Rowe testified an employee is required to report an injury or occupational illness to his supervisor and complete a report form. (Tr. 286-287). There was no report filed by Complainant. (Tr. 287). An accountable injury or illness is defined at 49 C.F.R. § 225.5 as "any abnormal condition or disorder of a railroad employee that causes or requires the railroad employee to be examined or treated by a qualified health care professional, regardless of whether or not it meets the general reporting criteria listed in § 225.19, and the railroad claims that, or the railroad otherwise has knowledge that an event or exposure arising from the operation of the railroad is a discernible cause of the abnormal condition or disorder." Rowe stated it is important to know what the employee believes caused or aggravated the condition. (Tr. 288). Rowe stated the FRA guidelines define a discernible cause as something which can be recognized as discernible; an event or exposure that occurred at work. (Tr. 289-290).

In response to a hypothetical question that assumed a report was filed by Complainant which cited "as the sun continued to rise and lights got brighter and the stress from being up all night" as contributing to the employee's illness getting worse throughout the trip, Rowe stated he would review the medical treatment records to determine if there was anything that was caused by or aggravated by work. (Tr. 290). He did review the medical records of Complainant and did not see anything that "tied this sinus type condition in with anything that was work exposed. There wasn't any comment by a physician. There wasn't anything that would lead me to believe that it was caused by or aggravated by any work activity or event or exposure." (Tr. 292). He stated, hypothetically, it would be difficult to report Complainant's incident as work-related or work caused to the FRA due to lack of information and lack of specific work causation. (Tr. 292-293).

In response to an additional hypothetical question which assumed that the Complainant's illness was induced or caused to be worse by the atmosphere of the locomotive cab, Rowe stated he would again have to look at the medical records and may talk to

co-workers to determine if there was anything unusual or discernible in the operations of the locomotive that day which would be different than any other day. (Tr. 293). The FRA standard of "more likely than not" is used to determine a good faith conclusion. He stated that hypothetically there was not enough certainty to conclude that Complainant's incident was a recordable or reportable illness because of a lack of understanding the work aggravation. (Tr. 294). However, in Complainant's incident, he did **not** talk to co-workers. (Tr. 295).

Rowe stated 49 C.F.R. § 225.15(c)(1) defines a non-reportable event/exception when an illness involves signs and symptoms that surface at work that result solely from a non-work related event or exposure that occurs outside the work environment and therefore is not considered work-related or reportable. (Tr. 296-297; CX-4, p. 2). Thus, if an employee has symptoms of an illness that had its genesis before the worker's shift begins, the illness would not be reportable and would not be considered work-related. (Tr. 297).

Rowe identified RX-8 as a Policy Statement and Complaint Procedures of Union Pacific required by Respondent's Internal Control Plan (ICP) approved by the FRA and based on FRA rules, specifically Part 225. The policy "came into play to prevent harassment and intimidation of employees when it comes to reporting of accidents and injuries and occupational illnesses." (Tr. 298-299). It is an internal control policy which governs employee injuries and occupational illnesses that are "on-duty, work-related illnesses." **He stated the policy prevents any harassment or intimidation of employees because of a reported occupational illness.** (Tr. 299). The wording for occupational illness is the same as that set forth in the General Code of Operating Rules 1.2.5. (Tr. 300; RX-1). The policy and procedures for a formal investigation are not followed if the injury or illness is not work-related. (Tr. 301, 304).

On further cross-examination, Rowe testified that it is not acceptable for a supervisor to intimidate or harass an employee for a personal illness. However, if an employee feels they have been harassed or intimidated because of a personal illness condition, they can pursue other avenues such as the ethics line. (Tr. 304-305). Rowe testified that it would not be acceptable under the Internal Control Plan for Wilson to harass, discriminate or discourage or prevent Complainant from getting medical treatment if Complainant asked for medical treatment related to a personal illness. (Tr. 306).

The Federal Railroad Administration regulations at Part 225 (CX-4, p. 2) refers to signs and symptoms that surface at work but result "solely" from a non-work-related event or exposure. Rowe explained that, in this instance, if the locomotive cab environment increased Complainant's symptoms of a headache, nausea, blurred vision, there would still need to be a discernible cause, like sounds or smells. It could be based on the senses of the employee or perceptions such as the "vibration of the locomotive," fumes that would increase a headache or affect an employee's eyesight, which would be an aggravation caused by the work environment. (Tr. 308-309).

Rowe testified that if an employee comes to work with illness symptoms and it progresses to get worse during the day, he would not automatically conclude the illness is a work-related reportable illness if the employee already had illness symptoms. The resulting illness was something from whatever happened outside of the work environment, and since illnesses progressively get worse throughout the day, it is difficult to determine if the illness was worsened by a discernible event in the work environment, or it was just a progression of their personal illness. (Tr. 308). Rowe further testified that it was his understanding that Complainant was ill before he came to work and his symptoms worsened throughout the day-thus, the question Rowe would have to determine is whether Complainant needed to get medical treatment because of some exposure in the work environment. The difficulty to figure out is "what is the discernible cause because he's in the normal work environment and hears the normal—he sees the normal sights, the sun, the

sounds, the smells that are typically associated with the job." (Tr. 309-310). Rowe opined that he believed Complainant's need for medical treatment was because of the personal illness he had. (Tr. 310).

Rowe agreed the term "out of the ordinary" is not in the definition of discernible cause or work-related. (Tr. 310). He stated **it is possible that "something that is there every day" in the environment could be normal and may still be a discernible cause.** (Tr. 311). The claims department was not involved in Complainant's case because he did not file an incident report. (Tr. 313).

Rowe became aware that Complainant was ill, and was on duty in a locomotive cab and that a manager had the information that Complainant's illness became worse over time. (Tr. 313). **A verbal report of work illness may be adequate if the employee is reporting something that is work-related or work caused or work aggravated, "then the supervisor should follow through with the injury report, giving it to the employee."** (Tr. 315-316). The **supervisors maintain the forms and should give the form to the employee.** (Tr. 313-314). If the employee gives no indication of the foregoing, Rowe saw nothing to cause a supervisor to provide the employee an injury form. (Tr. 316). If Complainant became ill in the work environment, "there would have to be something, some allegation or some relationship to the work environment." (Tr. 317).

The General Code of Operating Rules 1.2.5 "Reporting" states that "all cases of occupational illness must be immediately reported to the proper manager and the prescribed form completed." (RX-1). Rowe stated it is not enough for an employee to notify a supervisor, "they are to complete the report." (Tr. 318). **A report is important so a determination can then be made whether the incident is work-related.** (Tr. 318).

Jeffery Moore

Moore has been employed by Union Pacific for 27 years. He is currently Network Superintendent. (Tr. 325). He began with Respondent Union Pacific as a trackman, transferred into the Intermodal department and was promoted into the operating department in 1990 and later became a Superintendent in 2005 at Pocatello, Idaho. (Tr. 326). He was Superintendent in Pocatello in May 2009. His tasks as a yard superintendent included the safe movement of trains across the territory, responsibility for the engineering group, maintaining the tracks and responsibility for the mechanical group that maintained the cars. (Tr. 326).

On May 7, 2009, there were a lot of trains coming from all directions into the yard, inspections ongoing, fueling events and other work events. Complainant's train was first or close to the first train into the terminal with trains behind him. (Tr. 337-328). Moore received a call that an employee was sick on the train. He asked Wilson to go take care of the situation. (Tr. 328). Wilson later called and reported he had taken care of the situation, the employee stated he was okay to continue to work into the yard and the train was going to be able to move. (Tr. 329). Moore found out later that Complainant was sick before he boarded the train in Green River. Complainant had several options available to him when he boarded the train in Green River if he was sick: he could have called in sick; if he is away from the terminal and called in, he would not be paid, but would receive transportation back home. (Tr. 329-330). The Regional Office notified Moore that Complainant reported he felt he was forced to work while he was sick. (Tr. 330).

Moore spoke with **Wilson who assured him that he did not force Complainant to continue working**. (Tr. 330). Moore stated he has had several debates with union representative Millward, but does not recall any discussion with Millward about forcing an employee to work when he was sick. (Tr. 331).

Moore conducted a meeting with Complainant, conductor Paul, Wilson and several union representatives. (Tr. 331). Complainant reported in the meeting that he had a headache, was nauseated and throwing up and was sick. Complainant did not report that he had blurred vision or was dizzy. He did not state anything about not being sick before boarding the train for the return trip. Moore does not recall Complainant stating anything about his condition preventing him from operating the train safely. (Tr. 332).

Moore identified RX-7 as an e-mail he sent to the Regional Office about his meeting with Complainant. The e-mail was sent to Hunt, Regional Vice-President; Scott, Assistant Vice-President; and Huddleston, incoming Superintendent to Pocatello. (Tr. 333). Moore noted he offered his apology to Complainant for the actions of his management team in the handling of Complainant and Paul, the conductor. He stated "**this crew should have been taken off the train on arrival and we should have made other arrangements to get the work done.**" (RX-7). Moore also testified **Complainant was sick on the train and should not have been.** Wilson also apologized to Complainant and Moore considered the apology to be sincere. He does not remember Wilson qualifying his apology or stating he did not know why he was apologizing. (Tr. 334). Moore did not discipline Wilson because he felt Wilson followed protocol. (Tr. 335).

Complainant's train was within one to two miles of the yard. Wilson told Moore that he asked Complainant if he could operate the train safely to which Complainant agreed he could. (Tr. 335-336). Moore acknowledged that Complainant was left on the train for 45 minutes after his hours of service expired. (Tr. 336).

Moore testified that Wilson was very organized, very experienced and a really good communicator. Wilson was a good manager and employee and he had no occasion to see Wilson become confrontational with employees. (Tr. 337).

Moore did not field test Complainant more after the incident and did not instruct any manager to do more testing on Complainant. (Tr. 337). Moore testified it is not unusual to have two managers together observing employees. Moore testified a Field Training Exercise (FTX) is a safety process required by the FRA and Respondent's safety plan. It is used to insure employees are educated, trained and coached when they violate a safety rule or given accolades when they perform well. (Tr. 338). It has not been his experience with testing that it is not documented, although all observation testing may not be documented. (Tr. 338-339).

On cross-examination, Moore acknowledged he was not present on the train on May 7, 2009, when Wilson and Complainant discussed his illness and does not know what was said or how Wilson acted toward Complainant. (Tr. 339). Wilson did not tell Moore that he told Complainant "shit will hit the fan." (Tr. 340). Moore only recalled that he received a call that an employee was sick and may not make it into the yard. (Tr. 338). Moore affirmed that **if Complainant asked to get off the train, he should have been taken off the train.** (Tr. 341). Wilson did not tell Moore that he heard Complainant throw up as he was leaving the locomotive. (Tr. 341). Conductor Paul also spoke at the meeting and described the events of the incident. (Tr. 342).

Moore testified in deposition that he did not recall asking Wilson how or why Complainant felt intimidated by Wilson. (Tr. 343). He stated Complainant did not communicate well enough that he could not move the train and Respondent did not listen close enough. (Tr. 343). **Complainant should have been taken off the train at the terminal or in the yard.** (Tr. 344-345). Moore acknowledged that **Union Pacific should have made other arrangements to get the train's work done upon its arrival** in the yard. Based on the information Moore had, Complainant was not forced to work because he agreed to do so based on the information Moore had received from Wilson. He deposed that **they should not have been forced to finish their shift.** Moore assumed Respondent could have found other workers to help finish Complainant's job, but an engineer may not have been available.

(Tr. 345). Moore confirmed that "one spot" is crossing 208 and is considered to be in the Pocatello yard. (Tr. 347).

On re-direct examination, Moore stated he had enough information developed at his meeting to apologize to Complainant. (Tr. 348). Moore confirmed that Wilson asking Complainant several times if he wanted medical treatment or if he could continue working safely is proper procedure. (Tr. 348). Moore could not recall if Complainant and Paul told him no medical treatment was offered by Wilson. (Tr. 349).

Based on questioning from the undersigned, Moore testified that his meeting was not a fact-finding meeting, but a meeting to facilitate communication about what went on and to try to resolve the issue. The issue was that Complainant felt that he was forced to work when he was sick. (Tr. 350). Moore stated that during the three years he was at Pocatello there was a lot of problems between management and the employees; employees did not trust management and managers did not trust the employees. (Tr. 351). He concluded that Wilson miscommunicated to Complainant, but does not recall what was miscommunicated. Moore asked Wilson to apologize to Complainant. (Tr. 351).

Gary Phnister

Phnister has worked for Union Pacific for 37.5 years. He is currently Director of Road Operations. He is in charge of safety for all departments of the service unit, administers operational testing and is in charge of operational practices. (Tr. 353-354). He began with Union Pacific as a laborer in 1974 and later served as a fireman, was promoted to locomotive engineer and worked as an engineer until 2004 when he was promoted to manager. (Tr. 354).

As a locomotive engineer, he was field-tested (FTXs); as a manager, he was required to perform FTXs. (Tr. 354-355). As a senior manager of operating practices, he had to develop testing plans for the service unit and administer FTXs. There are four types of tests: structured stop testing; operational testing; safety testing; and quality testing. (Tr. 355). FTXs are FRA

mandated minimally every 120 days. Structured testing is done every 180 days for certified employees. Testing typically increases in the summer and winter months. (Tr. 356).

RX-11 was identified as a FTX Summary of active locomotive engineers from November 7, 2008 to May 7, 2009. He prepared RX-11 based on employee ID numbers and it depicts the "most tested" to "least tested" employee. Phnister identified RX-12 as a FTX summary depicting the same type of data conducted from May 7, 2009 to November 7, 2009. RX-13 was identified as a FTX summary from November 7, 2008 to November 7, 2009. (Tr. 357). The information set forth in RX-11, RX-12 and RX-13 is reported to the FRA and is maintained in the regular course of Respondent's business as a reporting function of EQMS, Employee Quality Management System.[8] (Tr. 358).

Phnister explained the structure of RX-11, which is based on employee identification numbers and reflects the FTX "efficiency testing," to include number of tests passed, the number of tests coached which are below standard and the number of "hear" which are in a formal investigative context. (Tr. 359). The managers conduct structured tests and observation tests; structured tests are set up or influenced by the manager, observation tests are not. The summary shows the employees who have the "most to least testing." (Tr. 360-361). Complainant is shown on page three with eight tests with no coaching events or rule violations and no tests below standard. Complainant is listed as number 115 of 178, in "the middle of the pack." (Tr. 362).

Phnister also explained RX-12 which reflects FTXs from May 7, 2009 to November 7, 2009. During the period, Complainant had 11 tests passed and no coaching events or rules violations. He was listed as number 101 out of 177 employees, or in the "middle of the pack." Although his tests increased from eight to 11,

[8] Complainant argues that in discovery he requested summaries of "all engineers with the Pocatello home unit," and the summaries produced by Respondent are a miscommunication consisting of all engineers, not just Pocatello-based engineers. He contends CX-2, a summary formulated from RX-11, RX-12 and RX-13, should be given equal weight in view of the miscommunication of information.

which were during the summer spike in testing, Phnister testified Complainant was not singled out for increased testing because some engineers were tested more and some less than Complainant. (Tr. 363-364).

RX-13 is a summary of a one-year period in which Complainant was tested 35 times, 29 structured tests and six observational tests. Complainant had 35 passes, no coaching events or rules violations. He again was 108 out of 180 engineers; in the "middle of the pack" according to Phnister. (Tr. 365).

CX-2 is a summary of FTXs from November 1, 2008 to February 28, 2010, and is based on RX-10, which is a summary of FTXs for any and all engineers, not just active engineers. (Tr. 366). The CX-2 summary was described as "not an apples to apples" comparison because it did not include only Pocatello engineers, but included engineers not assigned to the service unit or who did not work the whole time frame or worked one or two times and were tested. (Tr. 367). The employees added to the RX-10 summary include engineers from Salt Lake City, Utah or La Grande, Oregon who work into the service unit, but are non-Pocatello service unit employees. CX-2 is not an accurate depiction of how often an engineer is tested according to Phnister. (Tr. 368). If CX-2 was reflective of employees who were not assigned to the service unit, or not working as engineers, it would not indicate that Complainant was being singled out according to Phnister. (Tr. 369).

RX-15 is an EQMS score supporting document dated March 9, 2011, which shows Complainant scoring a 989 out of 1,000 on his FTXs. (Tr. 370-371). His score is in the top two percent and is considered outstanding. (Tr. 371-372). Phnister testified that the EQMS score does not show that Complainant was singled out or picked on over a period of 365 days after his illness incident. (Tr. 372).

Phnister testified that all observational tests are not de-briefed, only tests which are below standard require action such as coaching and input into the EQMS reporting system. (Tr.

372). If an observational test is passed, no de-briefing is required. If an observational test is found to be below standard, the manager must enter the FTX test in the computer. All FTX testing is inputted if it is a structured test. There may be occasions when observational testing is not entered into the system. (Tr. 372-372).

CX-12 is a work history for Complainant. (Tr. 373). The "status" column (STA) reflects how the employee is carried for the date or time period. Generally, personal or vacation days are compensated. "OSO" on page 5 of CX-12 is "other company service," such as a safety committee meeting which is compensated. (Tr. 374). "LPO" on page 6 of CX-12 reflects a "personal layoff" on July 2, 2009, and is not compensated. "VIO" on page 8 of CX-12 for July 14, 2009, is "other employee engagement" for the company and is compensated. (Tr. 376). "FD" is a free day on July 16, 2009, and is compensated. (Tr. 377).

Phnister testified that just because a manager is in the field, the manager is not always testing. All observations are not tests. (Tr. 377). Not all observations of employees are documented. Multiple managers could be out in the field at the same time. (Tr. 378). Phnister knows Complainant and considers him a good employee. He has never witnessed any retribution by anyone within the company against Complainant for any reason. (Tr. 378-379). He also has known Wilson since January 2004 as a Senior Manager of Terminal Operations or Transportation. He considers Wilson to be honorable and good with which to work. (Tr. 380).

On cross-examination, Phnister affirmed that he was not present on the train with Complainant and Wilson on May 7, 2009, and does not know what transpired. (Tr. 380).

RX-10 is a document Phnister complied which is not just all engineers with the Pocatello service unit. Some of the entries are conductors, some engineers are from Salt Lake City, Utah and some only performed one trip. (Tr. 381). RX-10 reflects "rules" testing. An "event" is a one-time happening. (Tr. 382-

383). Phnister establishes a testing plan to test rule violations that are causing human factor incidents. A manager can choose a test for one employee with more rules than another. (Tr. 383). The rules tested are based on employee criteria. (Tr. 385).

CX-2, which is based on RX-10, reflects 17,770 rules tested among 287 employees. (Tr. 387-388). There are a limited number of tests for employees not working in the Pocatello service unit. (Tr. 388). CX-2, page 3 shows the "mode" or middle person to be 143.5 of 287 employees and the number of rules tested to be 37. (Tr. 389). Complainant was tested on 122 rules and was 246 out of 287 employees; 41 engineers were tested more than Complainant. (Tr. 390). There was a 7.8% increase in testing for Complainant. Phnister testified that all engineers were tested more during the same time period. (Tr. 391). Complainant moved up from 115 to 101, but passed every test. (Tr. 391).

Phnister testified he was aware there was a sick engineer on the train on May 7, 2009. Wilson wanted Phnister to go out to handle the situation, but he was unable to assist. He heard afterwards that Complainant was sick and Wilson wanted him to work the train anyway. (Tr. 392).

According to Phnister, if Complainant is working a pool job and takes a personal leave day, he would be compensated for the personal leave but at a rate less than the pool job. (Tr. 392). If Complainant lays off on a personal day, he is not compensated at all and he would lose wages for any job he may have missed. Vacation days are calculated at one-fifty-second of Complainant's last year's earnings. (Tr. 393). Union Pacific has an absenteeism policy, but compensated leave, such as personal leave and vacation days, are not counted against absenteeism. There are no sick leave days, employees must use personal leave. (Tr. 394).

Phnister testified that field testing exercises can be increased by human factor events. (Tr. 394). Managers determine if there has been a human factor incident. However,

an employee's testing would not go up because he reported an injury with a human factor in his incident. (Tr. 395). There is a manager's report which is filled out for employee personal injuries. (Tr. 395). If there is no employee report, there is no manager's report. If a report is filled out for an occupational illness, a manager creates a manager's report as well. (Tr. 397). "Human factors" could be coded in the report, such as correction of employee actions in running through switches, making reverse movements, derailing cars. (Tr. 399). Increased testing would occur in that "problem area" of the human factor because that is a problem that needs to be corrected, but the increased testing is not directed at the employee involved. (Tr. 397-398). Phnister testified there would be no repercussions for an employee injury. (Tr. 398).

Phnister testified that he is aware of one employee who claimed she was dismissed because she filled out an injury report, but was not aware of any employee complaining of dismissal for an illness report. (Tr. 401). Phnister stated that Complainant passed every test on every rule administered to him. (Tr. 401). Phnister stated Complainant never lied to him, but he does not believe Complainant was harassed. (Tr. 402-403).

Phnister stated if an employee is sick, he would not want the employee on the train and will get him off the train. He thought Complainant's incident with Wilson was mishandled. (Tr. 403).

On further questioning, Phnister testified that RX-12 and RX-13 reflect the number of structured tests and the other tests are observational tests. (Tr. 405). Structured tests are de-briefed whether they are passed or failed. Observational tests which are failed must also be de-briefed. (Tr. 407).

Cameron Scott

Scott testified he has been employed by Union Pacific for 21 years. (Tr. 424-425). He is presently Vice-President of Network Planning and Operations and has been so employed for 30

days. He began with Union Pacific as an operations management trainee, worked a variety of field jobs and then in the dispatch center as a quarter manager. He also worked in marketing sales in the intermodal department, and progressed to a superintendent position for two years, as Assistant Vice-President in the western unit and then Regional Vice-President of the Western region. (Tr. 425).

On May 7, 2009, he was Assistant Vice-President of the Western region. (Tr. 425-426). He was in Pocatello on a business trip on that date. Regional Vice-President Ken Hunt contacted him about a "hotline issue" which had been recorded and directed Scott to determine the facts of the scenario and do his best to bring it to a resolution. (Tr. 426). Scott visited with Superintendent Moore and Wilson and determined the facts from them of what had happened from a management perspective.

Scott also conducted a fact-finding meeting with Complainant, conductor Paul and several union representatives. (Tr. 427). He considered the meeting to be good, open dialogue and very productive. Complainant talked at the meeting and stated he had a sickness/illness at some point on his trip from Green River, but did not provide any details of the illness or discuss dizziness or blurred vision. (Tr. 428). Scott considered the facts from management and the union to be "very consistent." Upon arrival of the train, the yardmaster directed it was to be "yarded," and a radio call was transmitted that Complainant was sick and would have difficulty completing his tasks. Scott stated Wilson was charged with going to see what was happening with Complainant. The information received from Wilson was that Complainant stated medical attention, a hospital or nurse was not necessary. (Tr. 429). Wilson asked if Complainant could do his duties to which Complainant agreed he could. (Tr. 430).

Scott testified that the management team did what was expected and what should have been done. (Tr. 430). He added that there were style issues with Wilson which Scott found to be inappropriate and "not consistent with where our company is headed." Scott stated there was disappointment in Wilson's

personal style of allowing "communicating and talking with the crew get a little bit out of hand," although there was no yelling, but Wilson was overly aggressive in tone. Scott testified Complainant did not fill out a Form 52032 report, but should have if he was claiming an occupational illness. (Tr. 431). Scott did not feel that Complainant's illness was an occupational illness, because he concluded Complainant had a "cold," not related to the railroad work or its environment nor aggravated by such environment. (Tr. 432).

At the meeting with Complainant, Scott asked what a desirable outcome would be for one of the managers misbehaving in how he interfaced with the crew and the union stated an apology would be satisfactory. Scott apologized to Complainant and asked Wilson to apologize.

On cross-examination, Scott acknowledged that at his deposition he stated he did not remember Complainant being at the fact-finding meeting. (Tr. 435). Scott's information about whether Complainant needed medical treatment was received from Wilson and Scott "covered the topic" with the union representatives. (Tr. 435-436). Scott concluded that all present at the meeting agreed that Complainant was asked if he needed medical treatment. (Tr. 436). In various later meetings with management and union representatives, it was discussed that medical treatment was offered if needed, there was no medical emergency, Complainant's work could be done, Complainant felt safe continuing, and he was asked if he was "ok." (Tr. 437). **Scott stated Wilson was aggressive and lost his composure and was inappropriate in his behavior. (Tr. 444).**

Scott stated 15-20 minutes should have been adequate to get Complainant off the train, not 40 minutes depending upon where Wilson was at the time. (Tr. 443). He does not remember any comments about "shit would hit the fan," but he knew "there was inappropriate interaction on board that train." (Tr. 444).

Hypothetically, Scott stated assuming Wilson did not ask Complainant if he needed medical treatment, there would be no violation if Wilson did not observe anything indicative of a

dire condition or a need to scramble emergency services. However, **if Complainant asked to get off the train because he needed medical care and Wilson ignored that request and said "no you need to continue to work," that would be a violation of the Union Pacific Internal Control Policy.** (Tr. 448). Scott testified he is familiar with CX-8, the Union Pacific Railroad Company Accident, Incident, Injury, Illness Reporting Policy Statement. (Tr. 449). The **policy applies to providing medical treatment to injuries and illness based on employee feedback.** (Tr. 450). Scott testified **if an employee says "I need medical treatment," the policy would apply to any injury/illness.** (Tr. 450). Scott further stated if Complainant was pale, sweaty and stated he had been nauseous, and Wilson heard a "vomit sound," Wilson should have doubled back to make sure the employee was "ok," before Wilson leaves the train. (Tr. 451-452). Scott stated Wilson's actions were inexcusable and the reason Scott apologized. (Tr. 452).

On re-direct examination, Scott stated **if an employee has blurred vision, it needed to be taken care of, because their industry is extremely visual.** Blurred vision is a "red flag." (Tr. 453-454). Scott confirmed that Union Pacific is committed to complete and accurate reporting of all accidents, incidents, injuries and occupational illnesses arising from the operation of the railroad. (Tr. 454; CX-8, p. 1). Complainant did not complete a report. (Tr. 454). Complainant had some type of sickness, but "it did not rise to an emergency response required." Scott concluded the crew could carry on and there was no occupational illness which was related to the company in any way, shape or form. (Tr. 455). Scott also concluded that Wilson and Complainant's interaction was not a violation of the Internal Control Policy. Scott never heard that Complainant was injured, and "it really was not an ICP issue." (Tr. 456).

Scott was investigating a behavioral issue with Wilson filed on the hot line which alleged Complainant was "not happy how he was handled in the interface with Wilson." (Tr. 456). Scott was of the opinion that Wilson should have double-checked with Complainant when he heard the dry heave gagging sound. (Tr. 457).

On re-cross examination, Scott testified that **if Complainant asked to taken off the train and needed medical attention, the crew should have been taken off the train even if the main lines were plugged for hours.** (Tr. 460).

Scott confirmed that the ICP policy also states **"Union Pacific will not tolerate harassment or intimidation of any person that is calculated to discourage or prevent such person from receiving proper medical treatment."** (Tr. 460). Thereafter, the policy attempts to link the prevention of harassment and intimidation to four scenarios: an accident; an incident; an injury; and an illness, such as a heart attack which has nothing to do with the company or the environment within the company or an illness which is related to potential company type issues. **Illnesses of any kind are envisioned and covered, as well as receiving medical treatment for any purpose and "for whatever scenario."** (Tr. 461-462).

On further examination, Scott testified the Internal Control Policy contemplates treatment for occupational illness. (Tr. 462). **If an employee has a non-occupational illness, the company cannot treat the employee inappropriately.** The employees would have other avenues to report management's mistreatment, but it would not be a violation of the ICP. (Tr. 462). Scott added if an employee is struggling and has diarrhea and needs to get off the train, **"a manager should not harass or intimidate the employee into staying on the train until their tour of duty is complete, particularly if the employee says 'I need to get off this train, I need medical attention'."** (Tr. 463-464). Scott testified **if a manager received a clear communication from an employee describing his symptoms and that they needed medical attention and needed off the train, it would be a violation of the ICP for a manager to ignore that information and force the train crew to continue to work.** (Tr. 464). Scott confirmed that the ICP and "even the 52032 is used for illnesses that are not occupationally related," and the example of an employee with diarrhea who needs off the train and needs medical care, for a manager to engage in harassment and intimidation and instruct the employee to continue to work is,

in his opinion, an ICP problem, **even if it is not occupationally related, such as a stroke, a diabetic reaction and a variety of health issues, "management absolutely has a responsibility to respond to that without any hesitation and without harassment or intimidation.**" (Tr. 465).

On further examination by the undersigned, Scott testified that he did not know who filed the hot line issue, but the scenario involved Complainant saying he was sick and the response of the management team and inappropriate behavior were all linked to the complaint. (Tr. 466). He concluded Wilson's behavior on board the train was inappropriate because he lost some self-composure. Scott does not remember anyone stating that Complainant "would have a target on his back" in the various meetings he attended. (Tr. 467).

Kathleen A. Hughes

Ms. Hughes has worked for Union Pacific for three years and three months. She is a general attorney who manages all of the employment-related litigation, advises the Human Resources department on work force related matters and serves as the national counsel for the whistleblower program. (Tr. 469-470).

RX-14 is an affidavit by Ms. Hughes dated September 11, 2012, which was prepared and based on data/records kept in the ordinary course of Respondent's business. (Tr. 470-471). The affidavit reflects there have been 181 complaints filed with OSHA alleging FRSA claims against Respondent since 2008 and nine violations found by OSHA. (Tr. 471). Of the nine violations found by OSHA, two were reversed by administrative law judge decisions and seven are still pending decision. (Tr. 471-472).

RX-14 also shows of the remaining cases: 60 cases were found against complainants by OSHA, of which 26 have been appealed to the Office of Administrative Law Judges, four cases were dismissed, two settled, five have been withdrawn and 15 are pending. (Tr. 472). Two cases have been removed to federal district court. Of the remaining cases with OSHA, 20 cases have been withdrawn; 18 cases were settled; and 74 cases remain open

and pending. (Tr. 473). In each of the case settlements, Respondent requested a non-admissions clause against liability. (Tr. 473-474).

On cross-examination, Ms. Hughes acknowledged a previous two-page affidavit dated August 24, 2012, reflecting 173 complaints filed with OSHA. (Tr. 476; CX-16). Eight additional cases were filed with OSHA from August to September 2012. (Tr. 476). Although 74 cases remain open, 15 cases are pending appeal for a total of 89 pending cases. (Tr. 477).

Susan Norby, R.N.

On October 2, 2012, the parties deposed Nurse Norby via video and provided the undersigned with a DVD of her deposition which has been received into evidence as RX-17.

Nurse Norby testified she is employed by Respondent and has been so since November 2007. She is an occupational health nurse who performs regulatory testing, responds to injuries and conducts prevention education. She was awarded a Bachelor of Science degree in Nursing in 2001. Previously, she worked as a Licensed Practical Nurse from 1984.

Nurse Norby testified that Complainant came in for evaluation and reported he was sick on the train. She performed his vital signs and observed his eyes were quite red. Complainant had an elevated blood pressure. Nurse Norby stated a blood pressure of 140/90 is considered high. She felt his forehead for a temperature and determined he had a normal temperature. She called the dispensary because of her concern for Complainant's eyes, but no provider was available. She discussed Urgent Care with Complainant and recommended he follow-up with Urgent Care. She asked if he was "ok" to drive himself and he responded he guessed so, he had operated a train. She testified that she is not allowed to drive employees to Urgent Care.

Nurse Norby testified that Complainant's blood pressure was not emergent and he was not in danger of having a stroke. He reported he was not dizzy, had no change in vision and no bloody nose. She did not tell Complainant his blood pressure was high or that he was on the verge of a stroke. She testified that Complainant was not in a life-threatening condition.

Regarding RX-9, the medical records of Complainant from Portneuf Medical Center, Nurse Norby testified that she is a trained medical professional and reviews medical records in the course of her duties. Complainant's medical records indicated that his history of present illness was a sinus drain for ten days, with pain of the left face, severe headache, teeth ache, and blood in mucous. His review of systems revealed sinus drainage, pain, cough, headache, musculoskeletal pain and chills. On physical exam, his blood pressure was 157/92, he had inflammation of the left eye with his pupils equal, round and reactive to light (PERLA), the ENMT part of the physical exam indicated "mucosa" with moderate inflammation and sinus percussion with pain in the frontal and left areas. (RX-9, p. 1). Complainant's chief complaint was "sinus." (RX-9, p. 3). He was taking Keflex medication. Complainant was administered two injections: a Toradol shot and Phenergan. Nurse Norby testified that a patient who is administered Phenergan should not drive since the injection makes the patient very tired. The nursing notes indicate Complainant had sinus congestion for one week with headache pressure and pain behind his eye with "eye draining." Complainant was diagnosed with sinusitis with cephalgia (headache). (RX-9, p. 3). He was prescribed Augmentin two times a day for ten days. (RX-9, p. 4).

Nurse Norby further testified that Complainant and Millward came to her office later to discuss a letter written by Millward about which she was not happy. They came to apologize to her. Millward told Norby that his comments were not personal and had nothing to do with her; her name was not set forth in the letter, but she is the only nurse who works for Respondent in Pocatello.

On cross-examination, Nurse Norby acknowledged she was not a medical doctor and, as a registered nurse, she does not diagnose and cannot prescribed medications. She has never worked at Portneuf Medical Center and does not know the nurse or the doctor who prepared the medical notes. She did not prepare the notes from the Medical Center. She affirmed that the blood pressure readings at the top of page two of RX-9 are not set forth in any section of the report and the time of the readings is not noted. She did not write the blood pressure readings. She stated a blood pressure reading of 157/92 is high. She did not document Complainant's blood pressure reading taken in her office-it could have been higher or lower. She confirmed that stress and pain can increase blood pressure. She further acknowledged that pain in the left face, drainage of the left eye, a headache and blood in the mucous can cause blurred vision.

Nurse Norby affirmed that she cannot recall Complainant's specific symptoms when he reported to her office, but she suspected sinus infection. Typical questions asked when a patient has high blood pressure are: whether there was a change in vision, whether there was blurred vision or dizziness. If the patient answered "yes" to any of those questions, she would not have allowed him to drive. She did not keep notes of Complainant's visit with her. She performs hearing and vision testing. She confirmed that blurred vision affects distant vision. The vision requirement for employment is 20/40. Nurse Norby acknowledged that diagnoses are outside the scope of her practice. She noted that a headache can be triggered or made worse by noise in the environment. She was not sure about the effects of light, except on a migraine headache. She noted she did not know if Complainant has a history of high blood pressure, but he was not on medications for high blood pressure.

On re-direct examination, Nurse Norby confirmed that Complainant did not complain about his work environment.

IV. ISSUES

1. Did Complainant engage in protected activity under subsections (a)(1) and (a)(4) of 49 U.S.C. § 20109 when his reported his illness and did his alleged request for medical or first aid treatment fall within the parameters of protected activity under subsection (c).

2. Did Respondent have knowledge of Complainant's alleged protected activity?

3. Did Complainant suffer any adverse unfavorable action?

4. Was Complainant's alleged protected activity a contributing factor in the alleged adverse unfavorable personnel action?

5. If Complainant meets his burden of entitlement to relief, did Respondent establish, by clear and convincing evidence, that it would have taken the same adverse action absent the alleged protected activity?

V. CONTENTIONS OF THE PARTIES

Complainant contends he left Pocatello, Idaho on May 5, 2009, and became ill on a return trip from Green River, Wyoming. He asserts the locomotive cab environment exacerbated his condition as the trip progressed. His illness was reported to multiple Union Pacific officials. Manager Wilson was sent to the train and Complainant informed Wilson he was in need of medical treatment which Wilson denied. Wilson told Complainant that if he got off the train "shit would hit the fan," and he would have "a target on his back." Complainant asserts his illness is work-related and he was intimidated and threatened for having reported his illness. He alleges he engaged in protected activity when he reported to Wilson that he was sick and needed to get off the train to seek medical attention.

Complainant further contends that he has three claims: being disciplined or threatened with discipline for requesting medical treatment for his illness in violation of 49 U.S.C. § 20109(a)(4); voicing a reasonable belief that there was a safety concern for him to continue working and operating a locomotive in his medical condition in violation of 49 U.S.C. § 20109(a)(1) which was reported to a person with supervisory authority over the employee (Wilson) who ignored the report in violation of the railroad rules; being denied or delayed in seeking requested medical treatment for his illness in violation of subsection (c) and being discriminated against by being "bird dogged" for engaging in protected activity by reporting a work-related illness. He avers his protected activity was a contributing factor in Respondents' adverse actions. Complainant avers that Conductor Paul supports his version of the events of May 7, 2009, and that Union Pacific apologized for their actions.

After being released from his shift, Complainant sought medical care from the railroad nurse who sent him to an emergency care facility. The hospital from which Complainant sought treatment would not release him to drive because of his illness.

He contends Respondents have not established by clear and convincing evidence that they would have taken the same adverse actions against him absent his protected activity. Complainant seeks as a remedy for 16 days of lost wages, restoration of leave days taken to address the stress he experienced from the incident with manager Wilson, general monetary damages, punitive damages and attorney's fees and costs of litigation.

Respondents argue that Complainant cannot demonstrate by a preponderance of the evidence that he engaged in protected activity. They allege that Complainant did not report a "work-related" illness to Respondents and his reported personal illness does not qualify as a work-related illness covered by the Act. They further contend that Complainant did not report or attempt to report a perceived violation of federal law relating to railroad safety or security to a supervisor. They assert that Complainant did not request medical or first aid

treatment for a work-related injury or illness and was not disciplined or threatened with discipline for requesting medical or first aid treatment for a work-related injury or illness. They contend Complainant cannot demonstrate that "relevant managers" within Union Pacific were aware of his alleged protected activity and that Complainant suffered no unfavorable action or other adverse employment action and is not entitled to any damages as a remedy.

Respondents argue that the central issue in this matter is credibility between Complainant and manager Wilson. Respondent contends that "bird dogging" as an adverse action is a red herring and that Complainant cannot prevail by or establish a preponderance of the evidence that he was discriminated against.

Respondents contend that Complainant had a sinus infection based on his symptoms and the pivotal issue is when his illness began. If Complainant was ill in Green River, he did not report the illness and it would not be protected activity. Wilson admits he used inappropriate language towards Complainant, but had no motivation to deny medical treatment. According to Wilson's mindset, he offered Complainant medical treatment. Complainant only visited a doctor on one occasion.

Respondents contend Complainant was not disciplined or threatened. Complainant passed all testing administered after the incident. Complainant had scattered days off which were compensated. Union Pacific apologized to Complainant on three occasions. Respondents argue punitive damages may be awarded only when there has been reckless or callous disregard for Complainant's rights, as well as intentional violations of federal law, which Complainant has not established.

VI. APPLICABLE PROVISIONS OF THE FRSA

Complainant alleges that Respondent violated the FRSA §§ 20109(a)(1) and (4) and § 20109(c), which provide:

> (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 . . .** 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;

(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;** and

(c) Prompt Medical Attention-

(1) Prohibition-**A railroad carrier or person covered under this section may not deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment.** If transportation to a hospital is requested by an employee who is injured during the course of employment, the railroad shall promptly arrange to have the injured employee transported to the nearest hospital where the employee can receive safe and appropriate medical care.

> (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 for 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.

49 U.S.C. § 20109(a)(1),(4) and (c)(2)(2008)(emphasis added).

VII. ELEMENTS OF FRSA VIOLATIONS AND BURDENS OF PROOF

Actions brought under FRSA are governed by the burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21). See 49 U.S.C. § 20109(d)(2)(A)(i). Accordingly, to prevail, a FRSA complainant must demonstrate that: (1) his employer is subject to the Act, and he is a covered employee under the Act; (2) he engaged in a protected activity, as statutorily defined; (3) his employer knew that he engaged in the protected activity; (4) he suffered an unfavorable personnel action; and (5) the protected activity was a contributing factor in the unfavorable personnel action. See 49 U.S.C. § 42121(b)(2)(B)(iii); Rudolph v. National Railroad Passenger Corporation (AMTRAK), ARB No. 11-037, ALJ No. 2009-FRS-015, slip opinion @11 (ARB March 29, 2013); Clemmons v. Ameristar Airways Inc., et al., ARB No. 05-048, ALJ No. 2004-AIR-11, slip op. @ 3 (ARB June 29, 2007); Luder v. Continental Airlines, Inc., ARB No. 10-026, ALJ No. 2008-AIR-009, slip op. at 6-7 (ARB Jan. 31, 2012).

The term "demonstrate" as used in AIR 21, and thus FRSA, means to "prove by a preponderance of the evidence." See Peck v. Safe Air International, Inc., ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. @ 9 (ARB Jan. 30, 2004); Brune v. Horizon Air Industries, Inc., ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13 (ARB Jan. 31, 2006)(defining preponderance of the evidence as superior evidentiary weight). Thus, Complainant bears the burden of proving his case by a preponderance of the evidence.

If Complainant establishes that Respondents violated the FRSA, Respondents may avoid liability only if they can prove by clear and convincing evidence that they would have taken the same unfavorable personnel action in the absence of Complainant's protected behavior. See 49 U.S.C. §§ 20109(d)(2)(A)(i) and 42121 (b)(2)(B)(iii)(iv); Menefee v. Tandem Transportation Corp., ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 6 (ARB Apr. 30, 2010) citing Brune, ARB No. 04-037, slip op. at 13.

In view of the undisputed facts noted above, it is found that Respondent Union Pacific is a person within the meaning of the FRSA and is responsible for compliance with the employee protection provisions of FRSA. It is also established that Complainant was a covered employee of Respondent Union Pacific under the FRSA. No evidence to the contrary was introduced at the hearing.

As outlined in the post-hearing briefs of the parties, the issue to be decided is whether Complainant's reporting of an illness on May 7, 2009, was a report of a "work-related" illness and thus a protected activity from which it can be argued it constituted a contributing factor in Respondent's decision to discriminate against Complainant.

A. Credibility and the May 7, 2009 Confrontation

Prefatory to a full discussion of the issues presented for resolution, it must be noted that I have thoughtfully considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, I have taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record contentions. See Frady v. Tennessee Valley Authority, Case No. 1992-ERA-19 @ 4 (Sec'y Oct. 23, 1995).

Credibility of witnesses is "that quality in a witness which renders his/her evidence worthy of belief." Indiana Metal Products v. NLRB, 442 F.2d 46, 51 (7th Cir. 1971). As the Court further observed:

> Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe . . . Credible testimony is that which meets the test of plausibility.

442 F.2d at 52.

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. Altemose Construction Company v. NLRB, 514 F.2d 8, 16 and n. 5 (3d Cir. 1975). Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing, manner and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and plausibility and the demeanor of witnesses.

Generally, I found Complainant's testimony to be consistent and credible. I find his pre-trial written statement to be corroborative of his hearing testimony. (CX-13). However, I do not credit his testimony that he felt "wonderful" when he began working on May 7, 2009, since he had reported to the dispatcher that he was not feeling well and the medical records reflect he had been suffering from symptoms for ten days. I find he had a pre-existing illness when he began working on May 7, 2009.

I also found Conductor Paul to be a sincere, unbiased and credible witness. The consistency and believability of their testimony is more fully analyzed below.

On the other hand, I was not favorably impressed with or persuaded by the testimony of manager Wilson for reasons explicated below.

These three witnesses were involved in the pivotal factual scenario which forms the basis of all controlling determinations in this matter.

On May 7, 2009, Complainant and Paul left Green River, Wyoming en route to Pocatello. Although he had a stuffy nose upon arriving in Green River, Complainant testified he physically felt fine and refreshed after 12-15 hours of rest. Complainant credibly testified that as his trip progressed, he began getting a migraine headache and felt nauseous. He stated the vibration and noise of the locomotive cab contributed to his headache becoming worse and not feeling well. He described his symptoms as starting with a migraine headache and as the sun light started to rise, he felt pressure behind his left eye, had a severe bloody nose, was light-headed and was gagging and puking. Towards the end of his shift, he stated his vision was becoming blurred.

Paul confirmed that there was nothing out of the ordinary about Complainant's physical appearance when the work day began on May 7, 2009. About half-way through the trip back to Pocatello, Complainant told Paul he was "feeling shitty." When daylight came, Paul observed Complainant was pale, sweating, coughing and blowing his nose. He concluded something was wrong with Complainant. Complainant complained of headaches which became worse as the trip went on, blurred vision problems and coughing. His symptoms seemed to get worse throughout the trip. Although Paul testified he did not know when Complainant first got sick, he confirmed Complainant had vision issues about which Paul was concerned, not because of his ability to operate the train, but because Complainant needed medical help. He could not recall if Complainant complained about the locomotive noise

and fumes making him sick, but it was obvious Complainant was sick. Wilson confirmed in deposition that Complainant reported to him that he had blurry vision in Topaz and affirmed that if an engineer is dizzy and has blurred vision, he should not operate a train. At the formal hearing, he inconsistently testified that Complainant did not tell him he had blurred vision. Astoundingly, Wilson stated of the remaining work hours, Complainant wasted one and one-half hours reporting he was ill.

Although Complainant affirmed that he did not depose anything about the locomotive contributing to his sickness, he also testified in deposition that he believed his illness was "work-related" and was induced or caused to be worse by the atmosphere in the locomotive cab. Even Wilson testified that he asked Complainant if he was feeling worse as the trip went on to which Complainant replied "somewhat."

The foregoing testimony about Complainant's symptomology and a nexus to the locomotive cab during the trip back to Pocatello is uncontradicted.

Both Complainant and Paul notified the yardmaster that Complainant had become sick throughout the trip and needed to get off the train to seek medical treatment. The yardmaster told them to standby at Cheyenne Street, crossing 211, where the locomotive was then stopped, and he would send a manager. Forty minutes later, there had been no response or relief. Paul radioed the yardmaster again and was told a manager would meet the train at crossing 208. When the locomotive arrived, no manager was present. Ten to fifteen minutes later, manager Wilson arrived.

Contrary to Wilson's testimony, there is little variance in the events recalled by Complainant and Paul once Wilson boarded the train. Complainant described Wilson's demeanor as very stern and threatening, whereas Paul stated Wilson got "festered up." I find Complainant credibly stated he informed Wilson he was sick and needed to get off the train and wanted to go to the hospital or go see somebody, "just get off the train, that [he] didn't feel well." Paul confirmed the remarks and added that Complainant stated he did not feel like he could do this work. Complainant told Wilson he was dizzy and had blurred vision. Wilson inexplicably admitted he told Complainant "if you're

sick, you probably should just stop the train and tell them you need to get off the train," exactly what Complainant was attempting to do by calling the yardmaster.

Both described Wilson's reaction similarly. Complainant stated Wilson went on a tirade; Paul stated Wilson was aggressive and raised his voice. It is noteworthy that having observed all three witnesses, Wilson was a large man compared to Complainant and Paul and arguably could be intimidating. Wilson told Complainant "shit was going to hit the fan if he laid off," a statement which Wilson acknowledges. Complainant testified that Wilson threatened and harassed him and stated Superintendent Moore will hear about this. Complainant told Wilson "if it's going to cost me my job, I guess I have no other choice. I guess I'll continue to do the work." Wilson inquired of Complainant "do you feel it's safe?" In the face of this query, Complainant responded that he had made his decision back at Cheyenne Street when he requested to get off the train, "that it wasn't safe" for him to continue working, but "I guess if it's my job, I'll continue to work." Wilson then radioed the yardmaster that the crew was going to continue to work until their hours of service were up. Wilson apparently concluded the issue was resolved.

Paul, who is completely unbiased in this matter, credibly testified that Wilson told Complainant that if he was going home, "you're looking at being fired or at the very least, a target on your back," and if the work does not get done, "shit is going to hit the fan." Complainant corroborated that Wilson stated he would have a target on his back. According to Paul, Wilson then asked Complainant "tell me, what's it going to be?" Complainant told Wilson he was sick and did not feel like he could do the job safely, "but I do not want a target on my back, and I don't want to be fired, so I guess I'll stay here."

I do not credit Wilson's testimony that he asked Complainant if he wanted to go see the nurse, go to the dispensary or to a doctor and that Complainant responded "no, he just wanted to go home." It was obvious that Wilson was under pressure that day to move trains and he wanted Complainant's train moved. Paul observed that he thought Wilson would have more compassion for Complainant because it was obvious Complainant was sick, but Wilson was aggressive and only concerned about getting the work done. Both Complainant and Paul credibly testified that Wilson did not ask Complainant if he needed medical treatment. As Wilson left the train,

Complainant opened the locomotive window and vomited or dry heaved out the window. Wilson thought Complainant was being a "smart alec" for doing so.

To the extent Moore and Scott reached conclusions about the events of May 7, 2009, based upon Wilson's recitation of the facts, I find their decisions and impressions were tainted by inaccuracies of Wilson's representations and therefore the weight and value to be accorded thereto is diminished. Wilson reported to Moore that the crew would work on, but failed to report he heard Complainant throw up as he was leaving the locomotive. Yet, he assured Moore that he did not force Complainant to continue working, but did not mention his statement about "shit would hit the fan" if Complainant did not continue working. Wilson told Moore the crew was okay to continue working. Contrary to Moore's conclusion, based on Wilson's report, that Complainant did not communicate well enough that he could not move the train, I find Complainant clearly explained to Wilson that he did not feel safe in continuing to operate the locomotive.

Scott's management perception of the events was based on reports from Wilson and Moore. Scott received information from Wilson that Complainant stated medical attention, a hospital or nurse was not necessary. Wilson reported to Scott that Complainant agreed he could perform his duties and failed to report Complainant's remarks that he did not feel safe in doing so. Scott concluded Complainant had a "cold" and his illness was not an occupational illness nor aggravated by his work environment. Although Scott knew Wilson had inappropriate "style issues," was overly aggressive in tone with Complainant, lost his composure and engaged in inappropriate interaction on board the train, he reached these conclusions apparently without Wilson reporting his "shit will hit the fan" comment to Scott or that Complainant would have a "target on his back." Nevertheless, Scott concluded Wilson's actions with Complainant were inexcusable, to which I agree.

Based on the foregoing, I find Complainant requested to get off the train because he needed medical care and Wilson ignored the request in violation of § 20109(a)(4). I further find that Wilson threatened and intimidated Complainant into continuing to work despite his illness and request to seek medical care and his reasonable belief that to continue working in his condition, to include inter alia symptoms of dizziness and blurred vision, was unsafe in violation of § 20109(a)(1). Based on Scott's

testimony, I find such a scenario violated Union Pacific's Internal Control Policy. Scott testified that the policy applies to **any** injury or illness. Nevertheless, Scott concluded, based on Wilson's account of the facts, which I have not credited, that the crew could carry on their work and there was no occupational illness related to the company in any way, shape or form. He further inconsistently determined the interaction as described by Wilson was not a violation of the Internal Control Policy.

Notwithstanding his conclusions, Scott acknowledged that the Internal Control Policy will not tolerate harassment or intimidation of any person that is calculated to discourage or prevent the person from receiving proper medical treatment. More telling, Scott confirmed that **illnesses of any kind** are envisioned and covered, as well as receiving medical treatment for any purpose and "for whatever scenario." He added, it is an Internal Control Policy problem for a manager to engage in harassment and intimidation, even if the illness is not occupationally related; "management absolutely has a responsibility to respond to that without any hesitation and without harassment or intimidation."

Lastly, I find that Respondents denied, delayed and interfered with Complainant's request for medical treatment and care by delaying the initial inquiry into his illness for at least 40 minutes by not meeting his locomotive at crossing 211, delaying another 15 minutes while the locomotive moved to crossing 208, requiring that he continue working his remaining three service hours despite his request to seek medical care and leaving Complainant on his locomotive for about 45 minutes after he completed his service hours without proper relief, all in violation of § 20109 (c) of the FRSA.

B. Protected Activity

By its terms, FRSA defines protected activities as including acts done "to provide information regarding any conduct which the employee **reasonably believes** constitutes a violation of any Federal law, rule or regulation relating to railroad safety . . . to a person with supervisory authority over the employee" or "to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or **work-related illness** of an employee." 49 U.S.C. § 20109(a)(1) and (4)(emphasis added). The evidence presented in the instant case is whether the facts establish

that Complainant engaged in protected activity under § 20109(a)(1)and (4) by notifying Respondent Wilson of his illness sustained on May 7, 2009, which he arguably and reasonably believed constituted a violation of the railroad's safety rules to continue working when he did not feel safe operating the locomotive, and whether such illness is one covered by the protective provisions of FRSA.

Respondent contends that Complainant did not engage in protected activity because he did not suffer from a work-related illness and reported a non-work-related illness. Respondent argues that Complainant did not engage in protected activity because he did not report a work-related illness within the meaning of the FRSA or OSHA regulations. Central to a resolution of this issue is whether Complainant's illness can be considered "work-related" under the FRA or OSHA standards.

Complainant contends that the locomotive cab environment exacerbated his condition as the trip progressed. He argues that his pre-existing illness, if any, was "significantly aggravated" by the exposure to his work environment on the locomotive. Respondent contends Complainant's illness was not work-related because it resulted from a non-work-related event or exposure that occurred outside the work environment.

The OSHA regulations regarding recording and reporting occupational injuries and illnesses provides that employers "must consider an injury or illness to be work-related if an event or exposure in the work environment either caused or contributed to the resulting condition **or significantly aggravated a pre-existing injury or illness**." 29 C.F.R. § 1904.5(b)(5). An injury or illness is considered to be a pre-existing condition if "the injury or illness involves signs or symptoms that surface at work but result **solely** from a non-work-related event or exposure that occurs outside the work environment." 29 C.F.R. §§ 1904.5(b)(2)(ii) and 1904.5(b)(5). **A pre-existing injury or illness** is considered to be "significantly aggravated" when the exposure at work causes:

> (iii) one or more days away from work, or days of restricted work, or days of job transfers that otherwise would not have occurred but for the occupational event or exposure

> (iv) medical treatment in a case where no medical treatment was needed for the injury or illness before the workplace event or exposure, or a change in medical treatment was necessitated by the workplace event or exposure

29 C.F.R. § 1904.5(b)(4).

The Federal Railroad Administration regulations regarding reports, classification and investigation of railroad accidents defines work-related accidents as those "related to an event or exposure occurring within the work environment." 49 C.F.R. §225.5. The regulations provide in pertinent part:

> An injury or illness is presumed work-related if an event or exposure occurring in the work environment is a discernible cause of the resulting condition or a discernible cause of a **significant aggravation to a pre-existing injury or illness.** The causal event or exposure need not be peculiarly occupational so long as it occurs at work.

Id. (emphasis added)

If an injury falls within the work-relatedness presumption, an employer can rebut it only by showing that the case falls within an exception listed in Section 225.15. Id. Section 225.15 provides that a railroad need not report injuries or illnesses where signs or symptoms surface at work but "result solely from a non-work-related event or exposure that occurs outside the work environment." 49 C.F.R. § 225.15(c)(1). I note that this standard is identical to the standard for determining whether an injury is pre-existing under the OSHA regulations at 29 C.F.R. §§ 1904.5(b)(2)(ii) and 1904.5(b)(5).

Form FRA 6180.55a is a guide for railroads to use in preparing accident/incident reports. The form indicates that work-relatedness is presumed for illnesses resulting from events or exposures occurring in the work environment, unless one of

the exceptions listed at 49 C.F.R. § 225.15(c) specifically applies. Where it is not obvious whether the precipitating event or exposure occurred in the work environment, the railroad must evaluate the employee's work duties and environment to determine whether it was more likely than not that an event or exposure in the work environment caused or contributed to the resulting condition or significantly aggravated a pre-existing condition. The form notes that a pre-existing injury has been significantly aggravated when an event or exposure in the work environment results in any of the circumstances listed under the OSHA regulations at 29 C.F.R. § 1904.5(b)(4). Therefore, I note that Form FRA 6180.55a incorporates the FRA regulations at 49 C.F.R. § 225.15(c) and OSHA regulations at 29 C.F.R. § 1904.5(b)(4) in determining whether a railroad must report an accident/incident.

Rowe also testified regarding accident/incident reporting under the FRA regulations. He testified that the regulations do not define "discernible," but he believed the FRA reporting guide defined it as "something that one can understand or see that something happened to cause something to happen, or to cause something to be aggravated." He reviewed Complainant's medical records and did not find any evidence suggesting that the illness was caused by or aggravated by any work activity. Rowe noted that a discernible cause does not have to be "out of the ordinary," and it could result from a situation that occurs every day.

Complainant testified that the locomotive vibrations and noise and the sunlight coming into the train worsened his conditions. His symptoms progressively worsened, causing a headache, eye pain, dizziness, a bloody nose, blurred vision and vomiting. I find based on Complainant's credible testimony, Complainant's illness was significantly aggravated by conditions at work which occur every day, including vibration and noise of the train and sunlight. Those conditions were discernible and caused a worsening of Complainant's condition. Therefore, I find the aggravation of Complainant's illness falls within the work-relatedness presumption.

Respondent could rebut the presumption by showing that the case falls within an exception listed in Section 225.15. Respondent contends the injury or illness involved signs or symptoms that surfaced at work but resulted solely from a non-work-related event or exposure that occurred outside the work environment. However, Respondent has presented no evidence showing that Complainant's condition was caused solely by a non-work-related event and was not worsened by the exposure to the locomotive vibrations/noise and sunlight at work. Further, Complainant's argument is buttressed by the fact that he had to seek medical treatment and was off of work for several days following the incident. Accordingly, I find and conclude that Complainant's illness was work-related under the FRA regulations at 49 C.F.R. §§ 225.5 and 225.15 and OSHA regulations at 29 C.F.R. § 1904.5.

Based on the foregoing, I find and conclude that Complainant engaged in protected activity by: reporting his illness which was significantly aggravated by his working conditions on May 7, 2009; requesting medical treatment or care which was denied, delayed or interfered with by Respondent; and expressing his belief that it was unsafe for him to continue performing his work while ill which he reasonably believed constituted a violation of the FRA safety regulations.

C. Knowledge of Protected Activity

Generally, it is not enough for a complainant to show that his employer, as an entity, was aware of his protected activity. Rather, the complainant must establish that the decision makers who subjected him to the alleged adverse actions were aware of his protected activity. See Gary v. Chautauqua Airlines, ARB Case No. 04-112, ALJ No. 2003-AIR-38 (ARB Jan 31, 2006); Peck v. Safe Air Int'l, Inc., ARB Case No. 02-028 (ARB, Jan. 30, 2004).

There is no question that Wilson, the person responsible for rejecting Complainant's notification of a work-related illness and requiring Complainant to work when he reasonably believed it to be unsafe, and who delayed, denied or interfered with Complainant's request for medical treatment or care knew of Complainant's protected activity. Superintendent Moore was notified by Wilson that Complainant complained of illness and wanted to get off the train, and the yardmaster knew an ill

engineer was aboard the train when Complainant and Paul radioed the yardmaster.

Thus, Respondent Wilson had knowledge of Complainant's protected activity. I find Respondent Union Pacific should have been aware of Complainant's work-related illness and reasonable belief that his continuing to work was unsafe and a violation of the FRA, had Wilson accurately reported the events of the May 7, 2009 confrontation with Complainant. Respondent Wilson, and implicitly Respondent Union Pacific, certainly knew of the delay, denial and interference with Complainant's request for medical treatment and care when he was required to complete his hours of service and delayed in his departure from the train while waiting for relief.

D. Alleged Unfavorable Personnel Action

By its terms, FRSA explicitly prohibits employers from discharging, demoting, suspending, reprimanding, or **in any other way discriminating against an employee**, if such discrimination is due, in whole or part, to the employee's lawful, good faith act done, or perceived by the employer to have been done to provide information of reasonably believed unsafe conduct, notifying Respondent of a work-related illness, or denying, delaying or interfering with Complainant's request for medical treatment or care.

In determining whether the alleged conduct is an unfavorable personnel action, the Supreme Court's Burlington Northern & Sante Fe Railway Co. v. White, 548 U.S. 53 (2006) decision as to what constitutes an adverse employment action is applicable to the employee protection statutes enforced by the U.S. Department of Labor, including the AIR 21, incorporated into the FRSA. Melton v. Yellow Transportation, Inc., ARB No. 06-052, ALJ No. 2005-STA-00002 (ARB Sept. 30, 2008). The Court stated that to be an unfavorable personnel action the action must be "materially adverse" meaning that they "must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." Burlington Northern, 548 U.S. at 57.

Respondent contends there was no adverse action in this case. Admittedly, Complainant was not discharged, demoted, suspended or reprimanded. However, I find Complainant was discriminated against and suffered adverse actions by Wilson's conduct which may well dissuade a reasonable worker from

reporting that they could not safely continue their shift because of illness. I further find that Wilson acted with discriminatory animus in so doing.

Complainant maintains that he suffered unfavorable personnel actions through intimidation and threats made by Wilson which would dissuade a reasonable worker from making or supporting a charge of discrimination, by missing work days because of the stress and anxiety of the May 7, 2009 incident and enduring increased field testing by Respondent Union Pacific. Each of these alleged personnel actions will be examined seriatim below.

1) Intimidation and Threats:

Complainant alleges that he was threatened and intimidated by Wilson after reporting his work-related illness and his reasonable belief that it was unsafe for him to continue working while ill and further was forced to continue working under the threat of loss of job, "shit hitting the fan," or having a target on his back" if he did not continue to work. I find the events as discussed above and the credible testimony of Complainant and Paul completely support such a finding and conclusion and I so find. Intimidation and threatening actions are prohibited discrimination. Vernace v. Port Authority Trans-Hudson Corporation, ARB No. 12-003, ALJ No. 2010-FRS-018 (ARB Dec. 21, 2012).

2) Loss of work days:

Complainant credibly testified that the May 7, 2009 event was stressful. Union Pacific had emphasized that "employment was a career not a job," but the incident with Wilson caused Complainant to lose sleep and become paranoid about the incident which caused him to take time off.

Complainant alleges he missed 16 days of work because of the stress of being intimidated and threatened by Wilson, notwithstanding the apologies from Moore, Scott and Wilson. He acknowledged he did not seek formal counseling for his stress and anxiety condition because it was not the way he was brought up. He testified he rarely went to a doctor and did not consider seeing a doctor for the personal issues of being intimidated and threatened by a supervisor who talked to him like he was a "nobody" and would have a target on his back.

He took 16 days off from May 2009 through October 2009, because of stress and anxiety, to include lack of sleep caused by the confrontation with Wilson and the aftermath of the event. Berrett corroborated Complainant's credible testimony that his sleep patterns and life habits changed after the May 2009 incident. Complainant seeks an estimated $200.00 per day for the days off based on a variance of compensation for each day of wages paid for leave taken and the potential jobs he was qualified for and missed because of his work absence.

The record reflects, and Complainant testified, he was in a "layoff" status on May 8, 2009, the day after the incident and took a day of personal leave for which he was paid $140. He estimated that had he worked that day on train WCYWFZ, he would have earned about $600.00. On May 25, 2009, he took a vacation day because he could not sleep the night before because of stress from the incident. He was paid $140 for the vacation day, but had he worked train YPCO2, he would have earned $200-$300. On June 11, 2009, Complainant again took a personal leave day because of stress from the May 7, 2009 incident, and was paid $140, whereas had he worked train MROHK, he estimated he would have earned $430.

On June 16, 2009, he was in a layoff status and carried as "OSO" or other service status while meeting with Scott. He was compensated for the "OSO" day. On June 20, 2009, Complainant was in a layoff status on personal leave because he could not sleep the night before after meeting with Scott and missed a "LCF39" job which paid about $300. On June 24, 2009, Complainant was placed on voluntary involvement status, "VIO," to attend his meeting with Superintendent Moore and was paid for a basic day of about $220. He claims he missed a dead head job on June 24, 2009, which would have paid him $600-$700.

Although he was shown in a layoff status on June 28, 2009, and carried "VIO," he testified he was actually working on a trip to Green River, Wyoming. On July 2, 2009, Complainant was carried on "other business" for the Union. I find that neither of these days is compensable since the first was not a layoff day and the second was not related to Complainant's May 7, 2009 incident or its sequelae.

On July 5, 2009, Complainant was carried in a layoff status and took a personal leave day because he had "enough of meetings and worrying" over the incident. He missed a PCHKB job which paid $600-$700.

On July 12, 2009, Complainant was in a layoff status and took a vacation day and was carried "LVO." On July 14, 2009, he was carried in layoff status as "VIO." Complainant did not specifically testify that either of these days was related to the May 7, 2009 incident. Therefore, I find that neither day is compensable as alleged adverse action.

Complainant also testified he was off work from July 16, 2009 through July 19, 2009, on vacation and sick leave,[9] but could have worked three days on a "MROHK" changing job on July 16 which paid $600, an "ABACL" changing job on July 17 which paid $600 and a "ZKCPD" changing job on July 19 which would have paid $600. From August 14, 2009 to August 16, 2009, Complainant was on sick leave and missed a "MHKPC" changing job on August 14, 2009, which would have paid $600, a "ZSEMN" job on August 15, 2009, which would have paid $600 and a "MNPPT" job on August 16, 2009, which would have paid $600.

On September 6, 2009, Complainant was on sick leave and missed a "KGZBR" job which paid $600. On September 17, 2009, Complainant took a vacation day and missed a "CTSSB9" job. On October 3, 2009, Complainant was on sick leave and missed a "GSGFTH" job which paid $300.

The foregoing represents the 16 days for which Complainant claims compensation at $200 per day as a result of stress or anxiety resulting from the May 7, 2009 incident. For reasons discussed below, I find the May 7, 2009 incident and the intimidation and threats made by Wilson were contributing factors to Complainant's credible claims of stress and anxiety which caused him to miss work on each day claimed. Therefore, he is entitled to be compensated for 16 days of missed work at a varying rate of $200 per day or a total of $3,200.00, plus interest.

I find such loss days of work to be a result of the sequelae from the May 7, 2009 incident and, therefore, derivative adverse action for which Respondents are responsible.

Respondents argue that Complainant did not show by a preponderance of the evidence that an unfavorable personnel action caused his mental suffering or emotional anguish in order

[9] Phnister testified Respondent Union Pacific does not provide employees with sick leave days.

to receive compensatory damages. They contend Complainant did not seek mental health treatment or counseling for his condition and his claim for 16 days off from work is without merit. I have credited Complainant's testimony regarding his absences and reasons he did not work. As the proponent of a theory that Complainant has not shown a nexus between the May 7, 2009 intimidation and threats and his absence from work, Respondents have the burden of proof and thus, the burden of persuasion to show otherwise under the Administrative Procedures Act, 5 U.S.C. Section 556(d). See generally Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993). I conclude Respondents have failed to carry their burden of persuasion.

3) Increased Field Testing

Complainant alleges he was subjected to unfavorable personnel actions by Respondent testing him in the field and "bird-dogging" him significantly more often after the May 7, 2009 incident. The record demonstrates Respondent conducts structured and observational testing. Structured testing is documented and debriefed by a manager. Observational testing is debriefed only if a manager finds a below standard action according to Phnister. Thus, no debriefing occurs if an observational test is passed.

Although Complainant testified unreported observational testing was being performed more frequently on him after May 7, 2009, only one incident was demonstrated in the record which arguably may have been observational testing. Millward testified he observed two white jeeps "bird-dogging" or following Complainant's train. Complainant testified he did not observe the two white jeeps. Complainant was debriefed by Bosh later that day, but C. T. Cranor inputted an observational test for which Complainant was not debriefed. The record does not support any other testing being performed on Complainant, much less increased testing. Complainant otherwise failed to provide specific testing dates, times or documents.

The records received into evidence depicting testing demonstrate that Complainant had no coaching events or rule violations and had no tests below standard. During the period from November 7, 2008 to May 7, 2009, Complainant was considered in the "middle of the pack" for FTX efficiency testing as number

115 out of 178 engineers tested. (RX-11; see also CX-2)[10]. After the May 7, 2009 incident, Complainant was listed as number 101 out of 177 for testing performed from May 7, 2009 to November 7, 2009, again in the "middle of the pack." (RX-12; see also CX-2). From November 7, 2008 to November 7, 2009, Complainant was tested 35 times, 29 structured tests and six recorded observational tests with all passes, no coaching events and no rules violations. He was rated as number 108 out of 180 engineers, or in the "middle of the pack." (RX-13; see also CX-2).

Furthermore, Complainant's EQMS score was 989 out of 1,000, or the top two percent of engineers and considered outstanding. Phnister testified that the EQMS score does not show Complainant was singled out or picked on over a period of 365 days after his May 7, 2009 incident. (RX-15).

Based on the foregoing, I find and conclude that Complainant has failed to demonstrate by a preponderance of the record evidence that he was subjected to adverse action by being field tested more frequently after his May 7, 2009 incident.

E. Contributing Factor

The FRSA requires that the protected activity be a contributing factor to the alleged unfavorable personnel actions against Complainant. 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." Ameristar Airways, Inc. v. Admin, Rev. Bd., 650 F.3d 563, 567 (5th Cir. 2011) (quoting Allen v. Admin. Rev. Bd., 514 F.3d 468 (5th Cir. 2008).

The Board recently observed in Rudolph v. National Railroad Passenger Corporation (AMTRAK), supra @16, that "proof of causation or 'contributing factor' is not a demanding standard. To establish that his protected activity was a "contributing factor" to the adverse action at issue, the complainant need not prove that his or her protected activity was the only or the

[10] CX-2 reflects the number of testing events for all engineers, not just active engineers or Pocatello-based engineers, and that Complainant was tested on 122 events and was number 246 out of 287 engineers tested. This number is skewed and does not depict relevant information upon which a determination can be made regarding the frequency of testing performed on Complainant. Therefore, I do not place equal value or weight on CX-2 as urged by Complainant since its scope is broader than RX-11, RX-12 and RX-13.

most significant reason for the unfavorable personnel action. The complainant need only establish by a preponderance of the evidence that the protected activity, "alone or in combination with other factors," tends to affect in any way the employer's decision or the adverse actions taken. Klopfenstein v. PCC Flow Techs., ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. @ 18 (ARB May 31, 2006).

The 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 demonstrated by a preponderance of the evidence that protected activity contributed to the alleged adverse action. Brune v. Horizon Air Industries, Inc., ARB No. 04-037, ALJ No. 2002-AIR-8, slip op. @ 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. @ 7-8 (ARB May 21, 2009) (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147-48 (2000)). A complainant is not required to prove discriminatory intent through direct evidence, but may satisfy this burden through circumstantial evidence. Douglas v. Skywest Airlines, Inc., ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-00014, slip op. @ 11 (ARB Sept. 30, 2009). Furthermore, an employee "need not demonstrate the existence of a retaliatory motive on the part of the employe[r] taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel actions." Marano v. Department of Justice, 2 F.3d 1137 (Fed. Cir. 1993).

Temporal proximity can support an inference of retaliation, although the inference is not necessarily dispositive. Robinson v. Northwest Airlines, Inc., ARB No. 04-041, ALJ No. 2003-AIR-22, slip op. @ 9 (ARB Nov. 30, 2005). However, where an employer has established one or more legitimate reasons for the adverse actions, the temporal inference alone may be insufficient to meet the employee's burden to show that his protected activity was a contributing factor. Barber v. Planet Airways, Inc., ARB No. 04-056, ALJ No. 2002-AIR-19 (ARB Apr. 28, 2006).

There is no doubt that Complainant's protected activity of reporting an illness, aggravated by his work environment, was the contributing factor in Wilson's threats and intimidation of Complainant. It was the contributing factor motivating Wilson to require Complainant to continue working despite his request for medical care and treatment and the basis for Respondent's denial and/or delay of or interference with Complainant's request for medical care and treatment and Complainant's loss of work days as discussed hereinabove. All of the foregoing are violative of the FRSA, § 20109, unless Respondents can demonstrate, by clear and convincing evidence that they would have taken the same unfavorable action in the absence of that behavior. 49 U.S.C. § 42121(b)(2)(B)(ii).

F. Clear and Convincing Evidence

The "clear and convincing evidence" standard is the intermediate burden of proof, in between "a preponderance of the evidence" and "proof beyond a reasonable doubt." Araujo v. New Jersey Transit Rail Operations, Inc., 708 F.3d 152, slip op. at p. 16 (3rd Cir. Dec. 14, 2012). To meet the burden, Respondents must show that "the truth of its factual contentions are highly probable." Colorado v. New Mexico, 467 U.S. 310, 316 (1984).

It must be noted that Complainant acknowledged he received no discipline for the May 7, 2009 incident. His benefits and terms of employment remain the same. However, he credibly testified he was "threatened basically with [his] job." I find Wilson's actions on May 7, 2009, intimidated and threatened Complainant and caused stress and anxiety that his career with Respondent Union Pacific was threatened. I further find that the 16 days of absence from work by Complainant was caused by the stress and anxiety emanating from the Wilson confrontation and intimidation.

I find and conclude that Respondents discriminated against Complainant by Wilson's intimidation and threats, requiring Complainant to work when he believed it was unsafe to do so and by denying, delaying and interfering with Complainant's request for medical care and treatment. Respondents did not discharge, demote, suspend or reprimand Complainant, but rather apologized twice for Respondent's actions and Wilson's inappropriate behavior towards Complainant. Given the factual circumstances of this case, it would take a circuitous argument to demonstrate that Respondents have shown by clear and convincing evidence that they would have taken the same adverse actions against

Complainant absent his protected activity. If so, similar violations would have occurred.

In post-hearing brief, Respondents make no argument that they have demonstrated clear and convincing evidence that they would have taken the same adverse actions. Instead, they argue Complainant did not engage in protected activity, did not report a perceived violation of Federal law relating to railroad safety, did not request medical treatment, was not disciplined or threaten for attempting to request medical treatment, that no "relevant managers" were aware of his alleged protected activities, that Complainant cannot link his alleged protected activity to an unfavorable personnel action, and Complainant has not suffered a compensable loss and cannot recover non-pecuniary compensatory damages or punitive damages. All of the foregoing have been discussed above, and contrary to Respondents' arguments, I have found and concluded otherwise for reasons fully explicated previously.

Accordingly, I find that respondents have not demonstrated by clear and convincing evidence that they would have taken the same adverse actions absent Complainant's protected activity.

VIII. REMEDIES

A successful complainant under the FRSA is entitled to all relief necessary to make the employee whole including reinstatement with back pay, compensatory damages and punitive damages. Specifically, the FRSA provides that:

> (1) An employee prevailing in any action under subsection (c) shall be entitled to all relief necessary to make the employee whole.
>
> (2) Relief in an action under subsection (c) (including an action described in subsection (c)(3) shall include
>
> > (A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;
> >
> > (B) any backpay, with interest; and

> (C) compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.
>
> (3) Relief in any action under subsection (c) may include punitive damages in an amount not to exceed $250,000.

49 U.S.C. § 20109(e)(1)-(3).

In the instant case, Complainant seeks compensation at the rate of $200.00 per day for the 16 days he was absent from work due to emotional stress and anxiety caused by the May 7, 2009 incident. He contends he is entitled to damages for the substantial pain and suffering he endured. He also seeks an award of punitive damages, litigation costs and attorney's fees.

1. Reinstatement and Back Pay

With regard to reinstatement, Complainant has not been terminated or demoted, thus reinstatement is not a necessary remedy here. Regarding back pay, Complainant credibly testified he was off work for 16 days due to stress, anxiety and lack of sleep caused by the incident. I find that Complainant is owed back pay for those 16 days plus interest. Complainant testified that his compensation for each day would have varied from $140.00 to $700.00 per day. Therefore, I find the $200.00 per day back pay Complainant is seeking to be reasonable.

To make Complainant whole, Respondent must pay to Complainant an amount of $3,200.00 for lost wages and also expunge any negative references in its records to Complainant's illness, his report of the illness and his complaint about Respondent's failure to comply with the Act.

Respondent shall also restore ten vacation leave days taken by Complainant because of the stress and anxiety of the May 7,

2009 incident. Vacation days were taken on May 8, 2009, May 25, 2009, June 11, 2009, June 20, 2009, July 5, 2009, July 12, 2009, July 16-18, 2009 and September 7, 2009.

2. Compensatory Damages

Contrary to Respondent's argument in brief, damages for emotional distress may be compensated under the Act. See Mercier v. Union Pacific Railroad Company, ARB Nos. 09-101, 09-121, ALJ Nos. 2008-FRS-3, 2008-FRS-4 (ARB Sept. 29, 2011); Anderson v. Amtrak, Case No. 2009-FRS-3 (ALJ Aug. 26, 2010); Bala v. Port Authority Trans-Hudson Corporation, Case No. 2010-FRS-26 (ALJ Feb. 10, 2012). "A complainant must show by a preponderance of the evidence that the unfavorable personnel action caused mental suffering or emotional anguish in order to receive compensatory damages for those conditions." Id. @ 14. (citing Testa v. Consol. Edison Co. of New York, Inc., Case No. 2007-STA-27 @ 11 (ARB Mar. 19, 2010)).

The Supreme Court has noted in employer retaliation cases that even when an employer makes an employee whole for lost wages, it does not make the employee whole emotionally. Burlington Northern v. White, supra, at 72 (2006). Even though the employer never terminated the employee, the court observed:

> But White and her family had to live for 37 days without income. They did not know during that time whether or when White could return to work. Many reasonable employees would find a month without a paycheck to be a serious hardship. And White described to the jury the physical and emotional hardship that 37 days of having 'no income, no money' in fact caused...('That was the worst Christmas I had out of my life. No income, no money, and that made all of us feel bad...I got very depressed.')

Id.

Here, Complainant credibly testified that he lost sleep, became withdrawn, anxious and generally depressed for approximately two to three months after the incident in which he was intimidated and threatened by Wilson. Complainant also credibly testified that he felt stressed and anxious following the incident. He also experienced a lack of sleep caused by the incident. Therefore, I find it proper to award compensatory damages in the amount of $5,000.00 for emotional distress.

3. Punitive Damages

The FRSA allows for an award of punitive damages in an amount not to exceed $250,000. 49 U.S.C. § 20109(e)(3).

The United States Supreme Court has held that punitive damages may be awarded where there has been "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law . . . ." Smith v. Wade, 461 U.S. 30, 51 (1983); see also Ferguson v. New Prime, Inc., ARB No. 10-075, ALJ No. 2009-STA-47 (ARB Aug. 31, 2011)($75,000 awarded in punitive damages based on a finding that the Respondent's fleet manager had intentionally violated a federal safety statute when he pressured Complainant to drive through hazardous conditions). The purpose of punitive damages is "to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future." Restatement (Second) of Torts § 908(1) (1979).

Punitive damages may be assessed in whistleblower cases to "punish wanton or reckless conduct and to deter such conduct in the future." BMW v. Gore, 517 U.S. 559, 568 (1996); Anderson v. Amtrak, Case No. 2009-FRS-3 (ALJ Aug. 26, 2010) (citing Johnson v. Old Dominion Security, Case No. 1986-CAA-3/4/5 (Sec'y May 29, 1991)). In determining whether punitive damages are appropriate, factors to assess include: (1) the degree of the respondent'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. See Anderson

@ 26 (citing Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 523 U.S. 424, 434-35 (2001)).

In the instant case, punitive damages are warranted for several reasons. Respondent and Wilson's culpability, particularly Wilson, were egregiously reprehensible resulting in retaliatory acts which caused Complainant to suffer physical and emotional harm. Wilson threatened and coerced Complainant into continuing to work despite repeated statements by Complainant that he could not safely work because of his illness symptoms and requests to seek medical care. Moreover, Respondent's actions also put Complainant's co-workers and the public in harm's way by requiring him to continue to work under such dire circumstances. I find that these actions demonstrate a complete indifference to, and a callous disregard for employee health and safety.

Completion of work was more important to Wilson than Complainant's request for medical care and treatment. Furthermore, once Respondent's officials became aware of Complainant's illness and request to seek medical care, Respondent and Wilson required him to complete his hours of service and then abandoned him on the locomotive for about 45 minutes before relieving him of his duties to seek the medical care which he had requested more than four hours earlier. Given this factual scenario, I find Respondent's conduct to be outrageous and unsympathetic to the rights of their workers. Therefore, I find it proper to award punitive damages to punish Respondent's disregard for worker's rights and to deter similar conduct in the future.

Cases suggesting comparable Respondent culpability have awarded significant punitive damage awards.[11] I acknowledge that

[11] For examples, see:

Ferguson, supra (awarding $75,000);

Hall v. U.S. Army, Dugway Proving Ground, Case No. 1997-SDW-5 (ALJ Aug. 8, 2002)(awarding $400,000 in compensatory damages for mental anguish);

Respondent sought to resolve this matter through meetings with Complainant and the Union, apologized for the incident and Wilson's inappropriate behavior and actions, all of which, in my view, diminishes the impact to be placed on a punitive award in this matter. Nevertheless, in view of the foregoing I find that punitive damages are warranted. I assess Respondent Union Pacific with punitive damages in the amount of $25,000.00 and Respondent Wilson, whose actions form the basis of all pertinent findings in this matter, with punitive damages in the amount of $1,000.00.

4. 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 thirty (30) days from the date of this Decision and Order within which to file and serve a fully supported and verified application for fees, costs and expenses. Thereafter, Respondent shall have twenty (20) days from receipt of the application within which to file any opposition thereto.

IX. CONCLUSION AND ORDER

For the foregoing reasons, I find and conclude that Complainant has established Respondents Union Pacific Railroad Company and Steven Wilson retaliated against him in violation of the Federal Rail Safety Act for reporting a work-related illness. Accordingly,

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Creekmore v. ABB Power Systems Energy Services, Inc., Case No. 1993-ERA-24, (Dep. Sec'y Feb. 14, 1996)(awarding $40,000 for emotional pain and suffering); and

Michaud v. BSP Transport, Inc., ARB No. 97-113, ALJ No. 1995-STA-29 (ARB Oct. 9, 1997)(awarding $75,000 in compensatory damages for major depression caused by discriminatory discharge).

IT IS HEREBY ORDERED that:

1. Respondent Union Pacific Railroad Company shall pay Complainant, Lonnie Smith, $3,200.00 in back pay for 16 days of missed work plus interest from the date such wages were lost until the date of payment at the rate prescribed in 28 U.S.C. § 1961.

2. Respondent Union Pacific Railroad Company shall pay to Complainant, Lonnie Smith, compensatory damages in the amount of $5,000.00 for emotional distress.

3. Respondent Union Pacific Railroad Company shall pay to Complainant, Lonnie Smith, punitive damages in the amount of $25,000.00.

4. Respondent Steven Wilson shall pay to Complainant, Lonnie Smith, punitive damages in the amount of $1,000.00.

5. Respondent Union Pacific will expunge Complainant's personnel file of any negative record or references related to his May 7, 2009 illness/incident, his report of the illness and his complaint about Respondent's failure to comply with the FRSA.

6. Respondent Union Pacific Railroad Company shall immediately restore ten days of vacation leave that Complainant took as a result of the stress and anxiety he experienced as a result of Respondent's conduct on May 7, 2009, consistent with this Decision and Order.

7. Respondent Union Pacific Railroad Company shall post a copy of this Order for 60 consecutive days in all areas where employee notices are customarily posted in the Pocatello, Idaho service unit.

8. Respondent shall pay Complainant's litigation costs and reasonable attorney's fees. Counsel for Complainant shall file a fully supported and verified application for fees, costs and expenses within thirty (30) days from the date of the instant Decision and Order. Respondents shall have twenty (20) days from receipt of the fee application within which to file any opposition thereto.

ORDERED this 22nd day of April, 2013, at Covington, Louisiana.

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

LEE J. ROMERO, JR.
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).