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Issue Date: 24 June 2015

CASE NO.: 2012-FRS-00077

IN THE MATTER OF

MARITA TUBBS

Complainant

v.

NORFOLK SOUTHERN CORPORATION
(THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY)
Respondent

DECISION AND ORDER

I. Procedural and Factual Background:

This case arises from a complaint filed by Marita Tubbs (Complainant) on May 15, 2012 against The Alabama Great Southern Railroad Company ("AGS") under the "whistleblower" protection provisions of the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. §§ 20109, (a)(1)(C) and (b) (1)(A). Sections 20109 (a)(1)(C) and (b)(1)(A) prohibit covered employers from discharging, demoting, suspending, reprimanding , or in any other way discriminating against an employee related to the terms and conditions of her employment for engaging in protected conduct. This conduct includes providing information to covered employers which the employee reasonably believes constitutes violations of federal law, rules, or regulations related to railroad safety or security.

Complainant alleged Respondent subjected her to four disciplinary actions in retaliation for her for four protected activities.[1] On August 6, 2012, OSHA's Area Director dismissed her complaint following which Complainant made a timely request for a hearing. Pursuant to that request, a hearing was held before the undersigned in Birmingham, Alabama from December 10 2014 through December 12, 2014 during which both parties called witnesses and introduced multiple exhibits and agreed to 48 stipulations.[2] Complainant testified on her own behalf and called two witnesses, Gregory A. Morgan, former road foreman in AGS's Alabama Division,

[1] The alleged protected activities and retaliation acts are set forth in Section II, below

[2] References to the record are as follows: Tr.-: hearing transcript,; CX-: Complainant's Exhibit; RX-: Respondent's Exhibit; .Stip.-: Stipulation.

and Freddy Neil Elders, union representative for the Smart Transportation Division of which Complainant is a member, and introduced 12 exhibits which were admitted. Respondent called six officials of Respondent as witnesses: Todd Reynolds, Daniel Bostek, Shannon Mason, Steven Smith, Robert Logan and Frank Gilley, and offered 15 exhibits which were admitted.

The Alabama Great Southern Railroad Company, an operating subsidiary of Norfolk Southern Corporation through Norfolk Southern Railway Company (Respondent), is an employer within the meaning of 49 U.S.C. § 20109. (Stip. 1). Complainant was employed by Respondent and is an employee within the meaning of 49 U.S.C. § 20109. (Stip. 2). Respondent hired Complainant as a conductor on August 2, 2004 and based her at its Birmingham terminal with routes running north to Chattanooga, Tennessee and south to Meridian, Mississippi. (Tr. 48, 49). As part of Respondent's training system Complainant was required to become a train locomotive engineer, which she accomplished in February 2007. (Stip. 3; Tr. 48, 49). At all relevant times, Complainant was a member of the United Transportation Union. (Stip. 6).

At all times material to this case, the Alabama Division was led by Todd Reynolds, the Division Superintendent (since promoted and transferred to Atlanta), who was responsible for approximately 1,200 employees involved with the operation of trains throughout Alabama and on the division mainlines between Sheffield and Memphis, and from the Mississippi state line through Meridian and into New Orleans, Louisiana. (Stip. 5). Complainant worked in the Alabama Division under the immediate supervision Gregory A. Morgan, road foreman of engines ("RFE"), whose job it was to train engineers and make sure they kept up with Federal Railroad Administration ("FRA") mandated qualifications. (Tr. 184). Morgan reported directly to Dan Bostek, division road foreman of engines ("DRFE"). Bostek became AGS Alabama's DRFE in October 2009 and worked there until February 2014.

II. Alleged Protected Activity and Acts of Retaliation

Complainant alleged the following four activities as protected under the FRSA as set forth in Stipulations 8 to 23. The first claimed protected activity concerned a report of injury involved with a train derailment which occurred on April 30, 2008 at the Vance Wood Yard in Vance, Alabama. On that date Complainant was the engineer on a locomotive which derailed at the Vance Wood Yard. As a consequence of that derailment Complainant suffered low back and abdominal strain injuries for which she received treatment and lost time from work. Complainant accepted responsibility and a 30-day suspension for that derailment, but served no suspension because she was off due to the injury. **(**CX-9; Tr. 49-61).

The second claimed protected activity occurred on June 19, 2009 while Complainant was working as a conductor in Meridian, Mississippi. On that day Complainant reported feeling hot and faint after working on the ground coupling her engine. She was allowed to rest and was seen by paramedics who diagnosed dehydration, following which she was relieved from duty. (CX-7, 10; Tr. 61-63).

The third claimed protected activity occurred on October 22, 2010, while Complainant was working as a relief crew engineer in Coaling, Alabama. On that day she boarded a train in Coaling which had been tied down on a siding awaiting a relief crew. After boarding the train Complainant released the hand brakes on the engines and her conductor released the hand brakes

on the cars, following which the train started to roll. When the Coaling train started moving, Complainant stopped the train by placing the brakes in emergency. Complainant reported the incident to the trainmaster Steve Smith and to the Mechanical Operations Center. At Complainant's request, all the brakes on the train were inspected by the Mechanical Department before the train left Coaling, and all the brakes were found to be in proper working order. (Tr. 63-74).

The fourth claimed protected activity occurred on April 19, 2011, in Meridian, Mississippi. On that day Complainant was assigned to pick up a set of light Union Pacific engines in Respondent's Meridian, Mississippi yard, when in coupling the engines to the train, she noticed that the feed valve on the airbrake system was set at 60 psi (pounds per square inch). Ms. Tubbs reported to her immediate supervisor, Greg Morgan, her suspicion that someone had attempted to sabotage her train. AGS operating rules require that the engineer check the train line air pressures, which are in big displays on the locomotive console, on each and every occasion before any movement of the train. There are multiple air gauges on the engineer's control stand, including the independent and automatic brake. The air brake feed valve is on the engineer's console. Given the multiple air gauges on the engineer's console, train line air pressure cannot be "hidden" from the engineer regardless of the setting of the feed valve, which is itself right on the engineer's console and easily adjusted.

Upon investigation, Complainant's supervisor found no evidence of sabotage and she was instructed to contact the supervisor should any other problems occur. Following the foregoing report and investigation in April of 2011, Ms. Tubbs has reported no further problems with train brakes or suspected act of sabotage.

After claiming the forgoing activities as protected, Complainant then asserted the following four acts of retaliation against her as set forth in Stipulations 24 through 44. The first retaliatory act occurred on December 7, 2010, while Complainant was serving as engineer on Train 393A737 near Bermul, Alabama, when her conductor, A. J. Wood, applied the emergency brakes as the train was approaching a stop signal, and the train stopped short of the signal. When approaching a stop signal, each member of the train crew (normally a conductor and an engineer) are responsible for and required to reduce the train speed and be prepared to stop without using the emergency brakes and to stop short of the stop signal. Although Complainant was primarily in charge of operating the train, conductor Wood applied the emergency brakes because he thought the train would not be able to stop at the signal using normal brake applications.

By letter dated December 13, 2010, Complainant was notified to attend a formal investigative hearing on December 21, 2010, to determine her responsibility in connection with the December 7, 2010, emergency brake application. The December 21, 2010, hearing was postponed eight times at the request of Complainant's union, agreed to by Respondent, and one time at the request of NS, with the result that the hearing was not conducted until October 26, 2011. After the disciplinary hearing on October 26, 2011, Complainant was found guilty of mishandling her train as it approached the stop signal, and on November 8, 2011, she received a 15-day deferred suspension, which was issued 11 months after the event on which it was based.

The second and third claimed act of retaliations occurred on July 23, 2011, while

Complainant was serving as an engineer on Train 164A623, when that train experienced two in-train separations (between two cars) on that day: one at 5:48 a.m. near Caldwell, Alabama, and the other at 12:45 p.m. in the vicinity of Fort Payne, Alabama. A significant measure of the success of train handling by locomotive engineers from both a safety and operational standpoint involve "separations," where there is a break in a coupling which causes one or more cars to actually separate from the rest of the train. Separations can and do produce both injuries and derailments, as well as significant interruptions in the movement of trains on the tracks where they occur. Separations, while sometimes the product of metal fatigue or other mechanical failure, can be a fundamental indicator of train crew competence and safety, principally on the part of locomotive engineers. Respondent's trains, which often are over a mile long, may move like a chain, one link or car at a time. Having "slack" in the coupling between each car allows much less power to move each car serially, rather than all the cars at once. The "slack" has to be managed while the train is in motion or when the train stops. Respondent's engineers are specifically trained and expected to handle elevation (or "grade") changes and curves, for which "slack" management always a critical component of proper handling, requires increased attention as the length of a train increases.

The July 23, 2011, train separations resulted in a risk of derailment and delays to train movement over the tracks on which they occurred. Following the two train separations on July 23, 2011, Complainant received two letters dated July 29, 2011, charging her with mishandling her train in both separations, and an investigative hearing was scheduled for each case for August 5, 2011. Complainant's union representative requested four postponements of the August 5, 2011 hearing, agreed to by Respondent, as a result of which the hearings for the two July 23, 2011 train handling separations were held almost seven months later on February 24, 2012.

As a result of the two disciplinary hearings for the train separations, Complainant received a letter of reprimand for the first separation and a 15-day deferred suspension for the second train separation, both of which were issued on March 8, 2012, eight months after the events had occurred. During her career as a locomotive engineer for Respondent, Complainant has experienced at least five train separations, including one which occurred after July 23, 2011. She has only been charged with poor train handling for three of those separations, the last of which resulted in minor discipline on May 30, 2013.

The fourth claimed act of retaliation involved Complainant's attendance. In correspondence dated February 10, 2012, Complainant was charged with failing to maintain an acceptable attendance record for the period from December 7, 2011, through February 7, 2012, during which time she reported off "sick" for 18 days. Following the March 20, 2012 investigative hearing, Complainant was issued a letter of reprimand on April 2, 2012, because of her failure to maintain an acceptable attendance record. On each of the four disciplinary assessments of which she complains in this case, Complainant's union representatives, acting pursuant to applicable labor agreements, submitted appeals to the Division Superintendent, who denied the appeals. Each of her four discipline cases were further appealed to Respondent's Director of Labor Relations, who likewise denied Complainant's appeal in each case. Because AGS and Complainant's union have been unable, at the highest levels, to resolve their disputes relating to her discipline, the next step pursuant to the applicable collective bargaining agreement is to list her cases for arbitration before a Public Law Board.

III. Testimony of Complainant, Gregory Morgan, and Freddy Elders.

A. Complainant

Complainant, a 44-year-old former employee of Respondent testified she worked for Respondent from August 2, 2004 until her dismissal nine years later which is currently being appealed. Complainant's dismissal is not, as indicated previously, a part of these proceedings. (Tr. 43).

Complainant testified she had no real trouble with Respondent before Bostek arrived. (Tr. 77, 78). After his arrival, discipline became more aggressive. As a result, although she tried to do a good job she suffered discipline issues with Bostek. Concerning the train separation incident of July 23, 2011, Complainant testified on that day she was engineer on a train with three to four engines, 1½ miles long with mixed freight and tonnage of 13,000 that traversed over a hilly terrain with six parts of the train moving at different speeds which she was supposed to control by managing slack so as to avoid separations. (Tr. 78-85; CX-11, RX-C). Although she had two separations, Complainant denied doing anything improper. (Tr. 89, 98). Complainant nevertheless received discipline for each incident and was represented by union representative Elders. Complainant also testified about receiving discipline (a letter of reprimand) for poor or unacceptable attendance between December 1, 2011 and February 7, 2011 when she missed 18 days because she lost her voice due to an upper respiratory infection for which she sought medical help but developed complications due to the medicine prescribed. (Tr. 99, 104; RX-D; CX-2). Complainant also testified she requested additional training on a simulator from superintendent Reynolds but never received any. (Tr. 100,101).

On cross examination Complainant admitted Respondent applied it attendance policy to other employees and that of the 18 days she missed, she had a doctor's excuse for only two days, December 26 and 27, 2011, although the policy indicated that it was not acceptable for employees to have frequent layoffs for illness without FMLA certification or current medical documentation. (Tr. 109, 100). Complainant also admitted never going back to the doctor to inform him about the medication problems. (Tr. 111). Further, the letter of reprimand she received for this incident was in accord with Respondent's progressive discipline for poor attendance having previously been counselled for poor attendance. (Tr. 112).

Also on cross Complainant admitted she suffered no discipline from the second claimed protected activity (dehydration incident in Meridian, Mississippi), the third claimed protected activity (handbreak and rolling incident in Coaling, Alabama) or the fourth claimed protected activity (report of feed valve setting at 60 psi in Meridian, Mississippi. (Tr. 118-125). Further, of Complainant's five train separations, Complainant's first two separations (second and third claimed act of retaliation) resulted in a letter of reprimand and a 15-day deferred suspension with a third separation on May 3, 2013 resulting in a lesser discipline of only a counseling, all of which occurred while Bostek was still DRFE with the first two disciplines issued on March 8, 2012 or about eight months after the July 23, 2011 incident. Regarding the first two separations of July 23, 2011 the hearing officer was R.L. Logan, and Complainant had no evidence he was "out to get her." (Tr. 128-132; RX-U). Bostek, moreover, never appeared or testified at the

hearing. Further, in the presence of Elders, Morgan, and Bostek, Complainant declined simulator training following the Bermul incident. (Tr. 133).

Complainant also admitted that from April 30, 2008 (her first claimed protected activity) to her first claimed acts of retaliation on March 8, 2012 when she received Logan's letters on March 8, 2012, almost four years passed, with three years between the dehydration incident and the Logan letters, with two years between the Coaling brake incident and the Logan letters, and one year between the alleged sabotage in Meridian and the Logan letters. (Tr. 146).

B. Gregory Morgan

Morgan testified that he is currently employed by Respondent as a locomotive engineer at the Chattanooga, Tennessee terminal. (Tr. 183). From 2004 through 2012 he served as a road foreman of engines, trainmaster, and training coordinator and division road foreman. As road foreman he supervised the supervised engineers (including Complainant) and kept them current with FRA-mandated qualifications and division rules. As training coordinator Morgan established training processes for new conductors and locomotive engineers and tested them on such. (Tr. 184). Morgan, as a road foreman, reported to Dan Bostek, division road foreman. (Tr. 185).

Morgan testified that Respondent operated feed valve settings for main line trains at 90 psi and 60 or 65 psi for yard service work. (Tr. 191). Regarding Complainant, Morgan testified Bostek told him while both were in the Birmingham road foreman's office that "you need to make it your life's mission to make sure she doesn't work another day on the railroad." (Tr. 192). Morgan could not recall the date of the conversation or the circumstances surrounding the statement. Subsequently, Respondent's trainmaster, Toby Compton, informed him that Bostek told him the same thing. (Tr. 193). When questioned by the undersigned if he or anyone else followed Bostek's instruction, Morgan said he had no knowledge of such action. (Tr. 194).

Morgan testified that the run from Birmingham to Chattanooga had hog back terrains with up and down elevations that made train handling more difficult as it would if heavier cars were interspersed throughout the train. (Tr. 195-96). Morgan testified that he was trained to determine in train separations how much of a knuckle, or fracture, was due to old versus new breakage. (Tr. 197). Morgan did not participate in the initial investigation of the Bermul incident but attended a later meeting with Elders, Complainant, and Bostek. He could not remember if simulator training was discussed, and he repeated that he did not know of any incident wherein Complainant was singled out for unfair treatment. (Tr. 215).

On cross Morgan admitted having filed suit against Respondent because of alleged illegal action Bostek took against him. He testified Respondent built a train with cars arranged by customer destination. (Tr. 217). Morgan also admitted receiving an e-mail from Bostek on December 8, 2010, one day after the Bermul incident, requesting he get on a train with Complainant and ride with her and then do simulator training to give her a graphic picture of what was happening at the rear of her train. (Tr. 220, 221). Morgan admitted finding fault with Complainant's Bermul performance. In addition, Morgan admitted including Complainant on a list of five engineers most likely to cause an RVD (rules violation derailment) or cause an injury

when asked by Bostek to prepare a list for additional training. (Tr. 229-231). Morgan testified he never told Todd Reynolds about Bostek's comments to him and that Reynolds was a man, like himself, concerned with safety. (Tr. 232). Further, the simulator used by Respondent could not duplicate the exact run or location of the Bermul incident or others. (Tr. 232).

C. Freddy Elders

Union representative Elders, who has represented Complainant on all charges brought by Respondent in her engineering capacity, testified he went with Complainant to simulator training and met with Bostek but did not allow her to take part in the simulator training because they could not agree on the amount of education and/or discipline (counseling and/or warning letter) which she was to receive. Elders testified that Morgan told him before the meeting that he felt Bostek wanted to get rid of Complainant and it was in part for that reason he did not want her to participate simulator training. (Tr. 265-67; 278-80). Elders testified that on least one other occasion he had talked with Bostek indicating she was making a genuine effort to do everything she was supposed to do. (Tr. 268).

IV. Testimony of Todd Reynolds, Daniel Bostek, Shannon Mason, Steven Smith, Robert Logan and Frank Guilly

A. Todd Reynolds

Reynolds, who is currently employed as Respondent's general manager of the Western Region, was Division Superintendent of the Alabama Division during Complainant's alleged protected activity and subsequent discipline. As Alabama Division Superintendent he was Respondent's only official with authority to impose discipline in that division. (Tr. 292-93). When there is an investigative hearing, as happened in the four instances Complainant asserts she received retaliatory discipline, Reynolds receives a transcript of the hearing and the hearing officer's recommendation.

Regarding Complainant's attendance, Reynolds testified that all new hires, including Complainant, were told when hired they were full-time employees subject to call whenever needed by Respondent in accord with regulatory constraints. (Tr. 294-97). Respondent monitored all train and engine (T & E) division employee attendance at a crew management center in Atlanta. (Tr. 298). When an employee's attendance became unacceptable, the center sent a file to the employee's supervisor for follow up to find out the reasons for the absence and whether anything needs to be done about it. Attendance was necessary for Respondent to operate safely and efficiently.

Respondent could not hire anyone to run a train but had to hire and train engineers and conductors to meet federal certifications demands. The training for engineers took about six months, and Respondent required engineers to pass field tests conducted by their immediate road foreman and the division road foreman. Once placed in the field, the field engineer had to

maintain his proficiency by taking and passing an annual check ride with their road foreman. (Tr. 303-06). This training cost Respondent about $500,000.00 per engineer. (Tr. 308). Engineers were also required to pass an annual rules test. (Tr. 320).

Concerning attendance, Reynolds testified employees were responsible for maintaining full-time employment and providing Respondent with acceptable information (medical documentation) about the nature and length of illness. (Tr. 307). Regarding train separations, Reynolds testified there were three main causes: 1) human factor; 2) mechanical or equipment failures; and 3) and track failures. (Tr. 321-24). When separations occur, emergency brakes apply (independent brakes on engine and automatic brakes on cars. (Tr. 325).[3] The entire train has to be inspected for derailments as well as the track for destruction. (Tr. 333).

Concerning the disciplinary process, Reynolds described a past practice under the collective bargaining agreement in which there was only a disciplinary hearing whereby Respondent notified the union and employee that an information hearing would be conducted by a hearing officer in which a charging officer (employee's supervisor) related what happened and was questioned by a hearing officer, as well as any other witnesses who testified. The hearing officer then examined the exhibits and testimony, which was recorded, and made a recommendation to the Division Superintendent who reviewed the record and made a decision on the discipline to be imposed. Later, the process was amended to include teamwork and training (Start Program), wherein if the employee accepted responsibility before the hearing for the alleged conduct, then the union representative, employee, and supervisor developed supplemental training, discussions and counseling and discipline that would drop off the employees record after a prescribed period of time and not used to impose greater discipline in the future except in assessing progressive discipline. (Tr. 344-45). As Division Superintendent, Reynolds had the sole discretion to impose discipline in every occasion subject to appeals to the Director of Labor Relations and a neutral Public Law Board. (Tr. 348-50). Complainant had nine disciplinary events on her service record. (Tr. 351).

Reynolds further testified he had no discussions concerning the discipline imposed on Complainant with Bostek receiving only the hearing officer's recommendations. (Tr. 353). Concerning the fainting spell in Meridian there was no discipline assessed with Complainant but rather her requests were granted, including granting her time off to spend with her family for Father's Day. (Tr. 357). Concerning the train separation incidents Reynolds could not recall any engineer having two separation incidents on the same day. (Tr. 361). In fact, Reynolds testified that undulating territories existed all over the railroad for which engineers were trained. (Tr.

[3] The locomotive or engine also has a dynamic break or electrical speed control that acts like a lower car gear to reduce speed.

362). Additionally, the train consist, or makeup of Complainant's train, was typical for Respondent with loaded and unloaded cars scattered throughout the train according to the destination. (Tr. 363). Reynolds further testified he had multiple conversations with Elders about Complainant in which Reynolds agreed to additional training which included simulator training with similar but not identical topography as Complainant experienced. (Tr. 365-66). As a result of the two separations, Reynolds testified Respondent experienced major delays (five or six train delays) on the main line with a huge loss of revenue. (Tr. 369-70).

Concerning the feed valve incident at Coaling on October 22, 2010, Reynolds denied any retaliation and stated Complainant did the right thing in asking for mechanical help. Reynolds further denied any retaliation for the April 20, 2011 incident wherein she reported a 60 psi and possible engine sabotage. (Tr. 371). Reynolds denied telling division officers that when Bostek spoke he was speaking for him but did tell divisional personnel that when it dealt with matter of engineer certification, training or, train handling, if Bostek requested information from them, he was speaking for Reynolds' office. (Tr. 372-73).

Reynolds testified Respondent provided training to its officers to avoid unlawful retaliation and required its supervisors to attend such training. (Tr. 374-75). Reynolds testified that the Caldwell and Fort Payne separations were different in that the Caldwell separation occurred while the train was moving as opposed to Fort Payne separation which occurred as she was starting from a stop and pulled the cars apart. (Tr. 376). Further, none of the four alleged protected activities had anything to do with the alleged retaliation she subsequently experienced. (Tr. 376-77).

Concerning simulator training, Reynolds testified Respondent uses this method to instruct and not impose further discipline as Complainant suggested. (Tr. 414-15). Further, the second train separation was caused by Complainant improperly starting her locomotive by advancing the throttle too fast and pulling the cars apart, thus breaking the key in question. (Tr. 416-17). In addition, Respondent's attendance policy about which Complainant had been counseled had no discretion or flexibility on the discipline to be imposed at each step, as opposed to Respondent's other rules. (Tr. 425-26). Reynolds considered Bostek's instructions to Morgan about compiling a list of those employees he felt to be at risk for a violation, derailment, or injury to serve a legitimate training purpose of identifying those in need of training to help them to avoid trouble. (Tr. 429-30).

B. Daniel Bostek

Bostek, who worked in Respondent's Alabama Division from October 2009 until February 2014, testified he denied telling Morgan or trainmaster Toby Compton, that he needed to make it his life's mission to make sure that Complainant did not get back in the cab of another Respondent locomotive. (Tr.441). Complainant's first disciplinary record after Bostek came into the Alabama Division was dated November 8, 2011 and involved a letter of reprimand and a deferred suspension of 15 days, and it never resulted in Complainant being taken out of Respondent's locomotive. (Tr. 442). Complainant next discipline of April 2, 2012, a letter of reprimand, also did not remove her from a Respondent's locomotive. Her third discipline dated September 27, 2012 caused her to be suspended but did not remove her permanently from

Respondent's locomotive. Claimant's fourth assessed discipline of May 13, 3013 involved only a counseling session with no loss of work. (Tr. 442-43). Claimant's fifth discipline of June 6, 2014 did result in Complainant's discharge but had nothing to do with Bostek, who by that time had left the Alabama Division. (Tr. 444-45). In fact, Bostek had no input into Claimant's discipline at any time, which was sole prerogative of the Division Superintendent.

Concerning Complainant's two separations on July 23, 2011, trainmaster Steve Smith and road foreman, David Foreman, both of whom were qualified to evaluate causes of train separation, informed Bostek that the first separation at Caldwell was due to improper management of slack through undulating territory. The second separation was due also to improper slack manager from a starting position. (Tr. 449-51). Neither Smith nor Foreman made any recommendations on discipline. Bostek did not discuss the case with charging officer Robert Logan or the Division Superintendent, Reynolds. (Tr. 452). Concerning these separations Complainant received a letter of reprimand and a 15-day deferred suspension. (Tr. 453).

Bostek testified he met with Complainant, Elders, and Morgan following the Bermul incident at the road foreman's office and the simulator room at the main office. There they went over the event recorder tapes in print and on a computer to explain to Complainant how her actions impacted draft forces. Bostek then loaded a cresting scenario into the stimulator to show her how drafting and buff forces occurred when cresting a hill. (Tr. 454). Bostek encouraged Complainant to get her console engine to the speed similar to the incident; she refused and terminated the simulator exercise. (Tr. 456). Bostek also offered to have an RFE from the Memphis district, Nicholas Mullins, ride with her, and Complainant marked off on the day Mullins arrived. (Tr. 457-58).

Bostek testified he had nothing to do with discipline concerning Complainant's attendance problems or with discipline related to her alleged protected activity. (Tr. 459). However, as engineer, Complainant was responsible for checking line or brake pipe pressure before releasing the hand brakes. (Tr. 460-61). On cross, Bostek testified he play no role in selecting hearing officers and denied deciding discipline for Complainant prior to simulator training. Rather, he openly explored Respondent's Start Program involving avoiding discipline.

C. Shannon Mason

Mason, who is currently employed as Assistant Division Superintendent of Respondent's Central Division based out of Knoxville, testified that before his current position he was employed by Respondent as system general road foreman of engines out of Atlanta, Georgia. Mason testified that an event recorder is a device on a locomotive designed to record speed, amperage, throttle position, and braking effort through automatic and independent breaks PCS switches showing how a train was handled during a particular event. Track profile and land profile is shown by a track chart or profile. (Tr. 478). In his employment with Respondent, Mason has analyzed between 1,200 to 1,500 event recorder tapes because of incidents running from stop signal violations to train derailments to evaluate engineer performance. (Tr. 479).

In this case Mason examined the hearing transcripts and exhibits involving Complainant's separations of July 23, 2011, including recorder and track profiles. (Tr. 480,

481). After examining all the data, Mason concluded that the Caldwell separation was due to the engineer's improper handling of the throttle. The second separation occurred because of major mishandling by the engineer allowing excessive slack action that happened to the train because of the way it was handled when it was started. (Tr. 482-500). Further, the discipline was appropriate and in accord with Respondent's system of progressive discipline. (Tr. 502).

D. Steven Smith

Smith, a former 40-year employee of Respondent, has held a variety of supervisor positions with his last position being district trainmaster between Birmingham and Chattanooga from the end of 2011 to March 2014. He testified he worked in the mechanical department for 22 years during which he worked on cars and supervised repairs of cars involved in train separations. (Tr. 554). Smith never worked for Bostek but was involved in the investigation of Complainant's two train separations of July 23, 2011. (Tr. 555). Smith went to the site of the first separation and found two broken knuckles or couplings and took pictures. The first broken knuckle occurred on the 90th car and had a 25% old break. The other knuckle occurred on the 111th car and had a 10% old break. (Tr. 557-60, RX-2B, RX-3B). The multiple and percentage of new versus old breakage indicated to Smith that train handling, rather than material failure, was the cause of the separation as confirmed by examination of the event recorder. (Tr. 561-62).

Smith investigated the second separation later that day and found a busted and cracked cross key indicating excessive draft forces. (Tr. 563-70, RX-4B, 5). Smith examined the train recorder and it indicated improper train stopping by a full service brake application causing all the slack to bunch up to the head of the train. When Complainant restarted the engine she pulled very hard, causing the rear of the train to roll back and causing draft forces pulling the train apart. (Tr. 571-72). Smith did not report to Bostek, who played no part in the train separation investigation. (Tr. 573). Smith had no contact with Bostek concerning this incident which resulted in seven hours delay of Complainant train plus the 4-hour-and-35-minute delay of another train, plus two other train delays which Smith characterized as a major railroad disruption. (Tr. 574-76).

Smith testified that he received a call from Complainant concerning a train rolling incident at Coaling in October 2010 which Complainant caused by her knocking off the hand brakes too early before she had enough break pressure on the breaks, causing the train to roll. Smith sent the mechanical foreman and several carmen who tested the train brakes and found them to be properly working properly without need of shooting the emergency brakes; Complainant was not charged in this incident. (Tr. 580). Smith also testified that Complainant a banner check at Woodstock wherein she failed to stop in the required distance without putting her train in an emergency and was charged, but had the charge reduced to a caution letter with the charge never proceeding forward. (Tr. 578-84).

E. Robert Logan

Logan, who is currently employed by Respondent as terminal superintendent in Memphis, testified he was the hearing officer in Complainant's two train separations of July 2011. Neil Elders and Colson represented Claimant with Respondent's case presented by Steve Smith. (Tr. 612). Logan testified that this case was the first he had heard of two training

separations on the same day. (Tr. 614). Logan did not have the authority to impose discipline. Rather, he could only recommend discipline to the division superintendent which he did in the form of a letter of reprimand and a 15-day deferred suspension from July 23, 2011 to March 8, 2012. (Tr. 622). Bostek had no input into the hearing process. (Tr. 624).

F. Frank Gilley

Gilley, who currently works for Respondent as terminal superintendent in New Orleans, testified he never worked for Bostek. Gilley was the hearing officer on the issue of Complainant's attendance held on March 20, 2012. (Tr.629, 630). At the hearing Complainant presented a doctor's excuse for two out the 18 days she missed. (Tr. 634, RX-3A). The attendance policy (RX-3) is not subject to the Respondent's Start Program, which provides for negotiated lesser discipline. (Tr. 635). Gilley made recommendations to the Division Superintendent with no input from Bostek. (Tr. 636). Gilley found Complainant had missed 18 days out of a 60-day period from December 7 to February 7, and the collective bargaining agreement in Article.6 F.4. requires engineers to produce a certificate from a reputable physician when they were off 30 consecutive days, which she had not done. (Tr.640, RX-J). Gilley admitted that Complainant told him that the doctor told her not to return until she felt better. (Tr. 639).

Gilley testified he recommended discipline because Complainant produced a doctor's excuse for only two days and management expects full time employees to produce doctor's excuses for all time claimed as sick days, and Complainant missed a significant amount of time (18 out of 40 days) and went to only one doctor in that period and never went back for different medicine when she claimed the medicine only made her sicker. (Tr. 644). Gilley treated Complainant as he would any other employee. (Tr. 646).

V. Argument

A. Complainant's Contentions

Complainant asserts that she had no problem relating to train handling until the arrival of Bostek, Respondent's division road foreman of engines (DRFE) who arrived in Respondent's Alabama Division and began supervising Complainant's first line supervisor, Morgan, road foreman of engines (RFE) in October 2009. Bostek remained in that position until February 2014. According to Complainant, after Bostek's arrival, discipline became more aggressive with Bostek informing Morgan and another supervisor, Toby Compton, they were to make their life's mission to make sure that Complainant did not work another day for Respondent. Further, Division Superintendent Reynolds allegedly told all divisional officers in a conference call that Bostek spoke for him and Assistant Division Superintendent Gooden and if Bostek conveyed anything to them it was to be treated as coming from Reynolds himself.

According to Complainant, following the December 7, 2010 incident, she and her union representative met with Morgan for the purpose of securing leniency in the form simulator training in place of discipline for this incident. Morgan told Elders that Bostek would not allow that and in fact wanted to get rid of Complainant. Elders advised Complainant to not undergo additional training under those circumstances because he could not agree with Bostek on the

discipline to be imposed. Elders asked the Division Superintendent about additional training since Complainant was making every effort to do her job correctly and was willing to take additional training, but he never received any response to this offer.

Complainant contends she engaged in four protected activities followed by four retaliatory acts by Respondent. The protected activities involved a report of injury in connection with an incident on April 30, 2008 in which she was responsible for causing a train derailment at the Vance Wood Yard near Vance, Alabama in which she sustained a low back and abdominal strain, received medical treatment, and lost time from work. The second protected activity involved an incident that happened on June 19, 2009 while she was working as a conductor in Meridian, Mississippi and experienced dehydration which she reported and in turn received paramedic assistance as requested and was relieved from duty. The third incident involved a October 22, 2010 roll-away train in Coaling, Alabama wherein she was dispatched as a relief engineer and allegedly rolled out improperly after the hand brake on the engine and cars were released requiring her to place the brake in emergency to avoid another train approaching on the main line and, in turn, reported the incident to her trainmaster. The fourth incident involved an improper locomotive feed valve setting of 60 psi rather than the 90 psi required of road freight trains that occurred on April 19, 2011 and which she reported as "train sabotage."

At the hearing Complainant argued four instances of retaliation, including an incident of December 7, 2010 when she was serving as an engineer near Bermul, Alabama and her conductor applied emergency brakes so as to avoid running past a stop signal which, following a disciplinary hearing, Complainant was found guilty of mishandling her train and issued a 15-day deferred suspension. In its post hearing brief Complainant makes no assertion of discriminatory action against her in reference to this incident but instead shifts attention to two separate train separations that occurred on July 23, 2012 near Caldwell, Alabama and in the vicinity of Fort Payne, Alabama for which she received a letter of reprimand and a 15-day deferred suspension claiming that if any of her protected activity played any part in the adverse action of charging or disciplining her, then a FRSA violation has been established.

Regarding her attendance, Complainant alleged she was charged with failing to maintain acceptable work attendance having taken off 18 days from December 7, 2011 to February 7, 2012 for which she received a letter of reprimand on April 2, 2012. Complainant contends Respondent provided no guidelines concerning acceptable and unacceptable attendance with an employee, according to the union collective bargaining agreement (Article 6.F.4), obligated to provide a doctor's excuse when he or she misses 30 consecutive days or more, which she did not miss and Respondent never asked her to produce a doctor's excuse for all the 18 days in question. Complainant argues that Respondent has no set policy to determine what is acceptable and leaves it up to the appropriate supervisor (Division Superintendent) to make that decision on a case-by-case basis, which Reynolds did in this case.

Finally, Complainant alleges that all supervisors who brought charges against her reported to Bostek or were answerable to Bostek pursuant to a telephone conference call with instructions given by Reynolds and noted by Morgan. In essence, Complainant alleges a conspiracy by Bostek and Reynolds to retaliate against her. As a consequence of Respondent's action, Complainant seeks to expunge the charges and discipline from her employment record, compensatory relief for emotional distress, litigation costs including reasonable attorney fees,

and punitive damages of $250,000.00.[4]

B. Respondent's Contentions

Respondent argues that (1) protected activity was not a contributing factor to any of its decisions to discipline Complainant; (2) there was no temporal proximity to any alleged protected activity; (3) nothing that happened at the simulator supports Complainant's case; (4) Respondent would have taken the same action in the absence of protected activities. Respondent asserts that Complainant's protected activities led directly to nothing but fair and beneficial treatment with no factual connection between any adverse and protected activity of Complainant. Complainant not only failed to establish any such connection, Reynolds who was the only official responsible for discipline denied it. Further, aside from Reynolds' denials, there was no temporal proximity between any protected activity and adverse action, and Bostek was not involved in any disciplinary hearing or those under his supervision. Indeed, Complainant received only minor discipline for rules infractions and was not singled out for more onerous treatment on a system-wide enforcement program required by federal law. Further, those who participated in the disciplinary process were not aware of Complainant's protected activities.

VI. FRSA Burden of Proof[5]

In *Araujo v. N.J. Transit Rail Operations, Inc.,*708 F. 3d 152, 157 (3rd Cir 2013) the Third Circuit noted that the FRSA incorporated the two-part burden shifting test of AIR 21 which required for a complainant to be successful he/she must prove by a preponderance of evidence three specific elements: (1) that complainant engaged in protected activity as statutorily defined; (2) that he suffered an unfavorable personnel action, and (3) that the protected activity was a contributing factor in the unfavorable personnel action. At times this test has been identified as one requiring complainant to prove four elements: (1) the complainant engaged in protected activity; (2) the employer knew that the complainant engaged in the protected activity; (3) the complainant suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. Once the complainant makes this showing the burden then shifts to the employer to avoid liability to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of complainant's protected acts.

A contributing factor is any factor which alone or in connection with other factors tends to affect in any way the outcome of the decision and does not require a complainant to show that the protected activity was the only or most significant reason for the unfavorable personnel

[4] Complainant also argues against Respondent's assertion that OSHA has no jurisdiction to entertain this complaint based upon an "election of remedies" provision of 49 U.S.C. § 20109 because Complainant sought relief from the EEOC for the same disciplinary action complained of in these proceedings. I have already addressed that issue in another proceeding involving Respondent and will not address it in these proceedings because it is unnecessary to do so in light of my findings in this case. *See Wiley v. Norfolk So. Rwy. Co.*, 2013-FRS-9 (Nov. 4, 2014) (Order Denying Respondent's Motion for Summary Decision).

[5] A more thorough discussion of contributory factor by the ARB appears in *Powers v. Union Pacific Railroad Company,* ARB Case No. 13-034, ALJ Case No. 2010-FRS-30 (ARB Mar. 20, 2015, reissued with full dissent Apr. 21, 2015).

action. The contributing factor standard does not require a complainant to prove that the protected activity was a significant, motivating, substantial, or predominant factor in a personnel action in order to overturn that action. The complainant need not provide evidence of motive or animus by the employer. *Araujo*, 508 F.3d at 158. Any weight given to the protected activity either alone or even in combination with other factors can satisfy the contributing factor test. *Marano v. Dept. of Justice*, 2 F.3d 1137,1140 (Fed. Cir. 1993). Moreover, the contributing factor element may be proven by direct evidence or indirectly by circumstantial evidence. *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 6-7 (ARB Feb. 29, 2012). Circumstantial evidence of contribution may rest on temporal proximity alone where relevant objective evidence does not disprove that element of the complainant's case. *See e.g. Spelson v. United Express*, ARB No. 09-063, ALJ No. 2008-STA-039, slip op. at 3, n.3 (ARB Feb. 23, 2011).

VII. Discussion

After a review of the record and taking into consideration Complainant's reduced burden under the FRSA as detailed above including no requirement of proving animus or retaliatory motive, I find Complainant has produced no credible evidence to indicate her protected activities, which were not disputed, played any part in the discipline she received. Complainant failed to show even circumstantial evidence of temporal proximity with as much as over three years and as little as eleven months between the protected activity and discipline.

Complainant's attempt to manufacture such a connection by showing animus on the part of Bostek, Morgan's supervisor, failed because it rested upon Morgan's testimony. It was Morgan who claimed Bostek told him and trainmaster Toby Compton to make sure Claimant never worked another day for Respondent. Bostek not only credibly denied doing so but rather instructed Morgan to provide additional training for Complainant whom Morgan identified as being one of five engineers most likely to cause a rule violation derailment (RVD) or injury in 2013. In fact, Bostek provided Complainant with simulator training which she declined, had RFE Nole from the New Orleans district ride with Complainant to provide additional training, and also arranged to have RFE Nicholas Mullins from Respondent's Memphis district ride with Complainant to provide additional training, but Complainant did not show on the date Mullins arrived for training. When questioned about Bostek's alleged animus statement, Morgan could not recall the date, occasion, or reason for Bostek's remarks and admittedly Morgan did not follow Bostek' s instructions and apparently no one else did either. (Tr. 192-94). Also, Morgan admitted having filed suit against Respondent and was using Complainant's attorney to represent him. (Tr. 215-16).

Morgan's later assertion that Division Superintendent Reynolds informed division supervisors that when Bostek asked them to do something he was speaking for Reynolds was also proven to be false and taken out of context when in fact Reynolds' credible testimony showed Reynolds' statement was limited to matters wherein Bostek was requesting information on engineer certification, training, and train handling.

Further, there is no evidence that Bostek ever charged Complainant with anything or had the authority to discipline anyone with that right resting solely with Reynolds who credibly

testified he had no discussions with Bostek about any discipline of Complainant. In fact, none of the charging officers reported to Bostek. In like manner, there was no credible evidence to support Complainant's assertion that after Bostek's arrival in the Alabama Division, she began to have train handling issues. In fact Bostek did not arrive in the Alabama Division until October 2009 which was well after Complainant's first engine derailment at Vance on April 30, 2008 and 30-day suspension. Indeed, the Bermul incident did not occur until December 7, 2010, about 14 months after Bostek's arrival and the separation incident at Caldwell and Fort Payne of July 23, 2011, more than 20 months.

Regarding the attendance issue, Complainant admitted she was excused by her doctor for only two days and that it was her responsibility to go back to the doctor if she did not improve, which she did not do even to discuss the problems with her medication. Further, Gilley's credible testimony showed her being treated no differently than any other employee concerning attendance.

In essence I find there is no credible evidence to support Complainant's assertions of retaliatory adverse employment actions because of her remote protected activity and thus find she has not met her burden under the FRSA to establish protected activity as a contributing factor. Accordingly, I dismiss the instant charges as lacking merit.

ORDERED this 24th day of June, 2015, at Covington, Louisiana**.**

Digitally signed by Clement Kennington
DN: CN=Clement Kennington, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=Covington, S=LA, C=US
Location: Covington LA

CLEMENT J. KENNINGTON
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).