U.S. Department of Labor

Office of Administrative Law Judges
William S. Moorhead Federal Office Building
1000 Liberty Avenue, Suite 1800
Pittsburgh, PA 15222

(412) 644-5754
(412) 644-5005 (FAX)

Issue Date: 19 December 2013

CASE NO.: 2013-FRS-3

In the Matter of:

DENNIS COATES,
Claimant

v.

GRAND TRUNK WESTERN RAILROAD COMPANY,[1]
Employer

Appearances:

Robert B. Thompson, Esq., and Robert E. Harrington, Esq.,
For the Complainant

Holly M. Robbins, Esq., and Joseph D. Weiner, Esq.,
For the Respondent

BEFORE: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER

I. Procedural Background[2]

This matter involves a dispute under the Federal Rail Safety Act, 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 ("9/11 Act"), Pub. L. No. 110-53 (Aug. 3, 2007) (hereinafter "FRSA"), and as implemented by federal regulations set forth in 29 C.F.R. § 1979.107 and 29 C.F.R. Part 18, Subpart A. The FRSA prohibits railroad carriers engaged in interstate commerce from discharging or otherwise discriminating against any employee because he engaged in protected activity.[3]

On September 19, 2011, the complainant filed a whistleblower complaint under the FRSA, alleging that the respondent, Canadian National d/b/a Grand Trunk Western ("GTW"),

[1] I granted the Employer's motion to name only Grand Trunk Western Railroad Company as respondent. (TR 4-5).
[2] The following references will be used: "TR" for the official hearing transcript; "ALJ EX" for an exhibit offered by this Administrative Law Judge; "CX" for a Complainant's exhibit; and "RX" for a Respondent's exhibit.
[3] 49 U.S.C. § 20109(a)-(c).

had terminated him on September 16, 2011 in retaliation for a previously filed FRSA complaint and for having reported an April 2, 2011 work-related injury. The complainant had filed his earlier complaint on January 3, 2011 alleging retaliation, i.e., being pulled from service, for having reported an illness, i.e., tachycardia, on December 22, 2010. It is not disputed that the prior complaint was dismissed on April 24, 2011. The respondent terminated the complainant on September 16, 2011 following a collective bargaining agreement hearing for admittedly having falsified his time record on March 11, 2011.

Complainant's September 19, 2011 complaint is the subject of the present proceeding and was timely filed. Complainant alleged that he suffered adverse personnel actions as a result of his prior whistleblower complaint, filed on January 3, 2011, and for reporting his April 2, 2011 work-related injury.

On September 20, 2012 after completing an investigation, OSHA dismissed the complaint, finding a preponderance of the evidence indicates that complainant's protected activity was not a contributing factor in his termination.

The complainant timely filed a request for this hearing on October 3, 2012. I was assigned the case on October 23, 2012. The matter was continued once at the respondent's request due to an unavailable witness. A second continuance due to an unavailable witness requested by the respondent the week before the hearing was denied.

A hearing was held by the undersigned from July 9, 2013 through July 19, 2013 in Cleveland, Ohio. At the hearing, Complainant's exhibits ("CX") 1, 1A, 2, 2A, 6 (Bates 387-389, 418-419), 7 (except 3d page), 9 (only Bates 170 and 190), 11-14, 23-25, and 25A[4], and Respondent exhibits ("RX") A, B, D, E, CC, FF, II, JJ, LL, SS, VV, and ZZ, were admitted into evidence, as further described herein. Both parties filed post-hearing briefs and post-hearing reply briefs.

II. Issues

1. Whether GRAND TRUNK WESTERN RAILROAD CO. ("GTW") qualifies as a railroad carrier engaged in interstate commerce?

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

3. Whether the complainant engaged in protected activity under the FRSA on January 3, 2011 and April 2, 2011, or some other established date?

4. If the complainant engaged in protected activity as an employee of the respondent whether the respondent was aware of the protected activity?

[4] Only the following portions of Bonner's deposition (CX 25) were admitted: p. 1-4; p. 40 line 24 through p. 41 line 12, p. 57-63, 65-66. (TR 400; TR 403-04). Mr. Bonner's attached statement was not admitted. The complete deposition (CX 25A) was admitted only for review purposes. Only pages 1-30 of Mr. Cross' deposition (CX 24) were admitted. (TR 400).

5. Whether the complainant suffered unfavorable personnel actions, i.e., was he discriminated against with respect to compensation, terms, conditions, or privileges of employment, e.g., when taken out of service and subsequently discharged?

6. If the complainant had engaged in protected activity as an employee of the respondent and the respondent was aware of the protected activity, did the protected activity contribute, in part, to the decision by the respondent to discipline him, i.e., was it a factor which, alone or in connection with other factors, tended to affect in any way the outcome of the decision?

7. Whether the respondent can demonstrate, by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior?

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

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

10. If the respondent violated the Act, are punitive damages appropriate, and if so, what amount?

III. Stipulations

CANADIAN NATIONAL D/B/A/ GRAND TRUNK WESTERN RAILROAD CO., (or "GTW") qualifies as a railroad carrier, as defined by the Act, engaged in interstate commerce. GTW, at times relevant to this case, was governed by the terms of a Collective Bargaining Agreement ("CBA") with respect to Complainant's employment.

The complainant commenced work with GTW on or about January 1998.

The complainant worked at the GTW's Rogue Yard in Michigan in 2010 and 2011 as a conductor.

The complainant was an employee of the GTW, working as a conductor on the dates of alleged protected activities.

The complainant was, at the time period under consideration, a member of the United Transportation Union ("UTU").

Phillip Tassin was, in September 2011, the General Superintendent of the Michigan Division.

James Golombeski was, in September 2011, the Assistant General Superintendent of the Michigan Division.

For the time period of March 11, 2011 until September 2011, Rufus Trevillion was a trainmaster.

An investigative hearing (pursuant to the CBA) regarding the complainant was held on December 30, 2010.

By letter dated January 14, 2011, complainant was assessed a thirty-day suspension based upon the December 30, 2010 investigative hearing. General Superintendent Tassin was the GTW official responsible for reviewing the results of the December 30, 2010 investigation and deciding upon any personnel action.

The complainant filed a complaint pursuant to 49 U.S.C. § 20109 in January 2011, against GTW.

The Secretary of Labor issued findings on April 4, 2011.

Complainant appealed the Secretary's Findings regarding complainant's January 2011 complaint. Complainant's January 2011 complaint was dismissed on June 10, 2011 by an Administrative Law Judge upon complainant's request that it be withdrawn.

On March 14, 2011, the complainant was notified in writing that he was to be investigated (pursuant to the CBA) to determine whether he had falsified his tie-up time, on March 11, 2011.

The investigative hearing was postponed several times at the request of the complainant's union or the complainant himself and eventually was held on September 9, 2011.

On April 5, 2011, the complainant was notified of an investigative hearing (pursuant to the CBA).

Complainant was medically excused from work beginning on April 3, 2011, until August 31, 2011 when he was cleared to work.

On September 9, 2011, GTW held the investigative hearing regarding whether complainant falsified his tie-up time on March 11, 2011, and if so, his responsibility for any resulting rule violations. Mr. Willett was the hearing officer.

General Superintendent Tassin was the GTW official responsible for reviewing the results of the investigation and deciding upon any personnel action.

Based upon the September 9, 2011 investigation, on September 16, 2011, Mr. Tassin determined that complainant's employment would be terminated for falsifying of time records and violating rules on March 11, 2011.

Complainant was advised by letter dated September 16, 2011 and signed by Mr. Tassin that he was dismissed from employment with GTW.

On September 19, 2011, complainant filed his second complaint pursuant to 49 U.S.C. § 20109 with OSHA, US Department of Labor. That complaint is the subject of the present proceeding.

On September 20, 2012, OSHA dismissed complainant's September 19, 2011 complaint. The complainant timely filed a request for this hearing on October 3, 2012. (ALJ Exhibit I).

IV. Facts

Mr. Coates began working for GTW in Flat Rock, Michigan, in 1998 as a brakeman/conductor. He worked at their Rouge Yard in 2010-2011 as a conductor. Conductors supervise the operation and administration of trains. (CX 2). His tenure at GTW had its ups and downs. The portion of his disciplinary record admitted (CX 2 attachments) shows a letter of reprimand, in 1999, for missing two calls; a ten-day suspension, in 2000, for violating GTOR 103, 705, 711, and GT Spec. Inst. 2.9 resulting in injury to Mr. Peacock; a three-day suspension, in 2001, for missing three calls; a letter of reprimand, in 2006, for absence; a letter of reprimand, in 2008 for excessive absences; a ten-day suspension, in November 2008 for missing a call; a ten-day suspension, in 2010, for running a yard switch with resulting derailment; and, a 30-day suspension, in January 2011 for failing to comply with instructions and deserting his assignment. In June 2010, the team on which he served received recognition for their superior support of Ford Motor Company. (CX 2). His performance reports, from 2005 to September 2010, reflect that he worked safely, efficiently, well with his peers, and worked on needed improvement of his attendance. (CX 2). He worked to reduce overtime in 2006-2007 and reported idle cars. In 2007, his supervisor, Mr. Teague rated him "outstanding," and a "much-improved," reliable, "role model" for new employees. (CX 2). In 2008, supervisor Brandon Smith rated him "needs improvement" primarily due to attendance issues. In 2009, Mr. Smith rated him a "skilled railroader who takes care of his crew and works well with others. In 2010, presumably Mr. Trevillion, rated him "needs development" with attendance issues, 100% rules compliance, who understands customer needs and acts accordingly. (CX 2).

In September 2011, Mr. Phillip Tassin was appointed General Superintendent of the Michigan Division, which included the territory in which the complainant worked. He had previously worked at the Rouge Yard as an assistant in 2004. (TR 483). He was responsible for bringing on Mr. James Golombeski, in November 2011, as his Assistant General Superintendent of the Michigan Division. (TR 408). He and Mr. Golombeski oversee more than 100 employees, nine managers, and seven stations, including the Rouge Yard in Flat Rock station. (TR 408). Mr. Tassin testified that the purpose of GTW discipline is to change an employee's behavior although GTW had no (formal) policy regarding discipline. (TR 524). He added that with respect to falsification of duty times, "any employee who 'steals' time will not be an employee (of GTW)." (TR 36). In his view, dismissal is "automatic," as it is with cheating, stealing, or fleeing a train. (TR 36). GTW is not over-staffed and it hurts the company to lose employees. (TR 91).

As a result of some 2010 complaints that the work was untimely and not being completed, Mr. Tassin sent Mr. Golombeski to the Rouge Yard to get to the bottom of it. (TR 318). Mr. Golombeski went to the Rouge Yard, on December 21, 2010, observed jobs 209 (Mr. Folz and Mr. Wood) and job 229 (Mr. Coates and Mr. Mitchell) and recorded times. He observed that at 1908 hours Mr. Coates was admittedly eight minutes late for work, on December 21, 2010, and asked him about it. (TR 415). According to Mr. Golombeski, Mr. Coates responded, "I'm only human." (TR 415). Mr. Golombeski testified he was taken aback by the response. (TR 415). Mr. Golombeski returned to the Rouge Yard, on December 22, 2010, and encountered Mr. Coates at 1902 hours, two minutes after his start time, and again asked him about why he was late and not ready for work (as required by GTW rules). (TR 418). According to Mr. Golombeski, Mr. Coates denied being late, said he could not be spoken to that way, and walked away when the former asked for a statement. (TR 418). Mr. Coates testified he had arrived at work on time at 1900 hours and that when Mr. Golembeski confronted him he denied tardiness and the latter raised his voice whereupon he told him he could not talk to him that way. (TR 109). Later that evening, while observing job 229, he noticed Mr. Coates was taking a long time to perform his job. When he asked about it, Mr. Coates told him his heart was racing, turned his back and left, at which point Mr. Golombeski, and removed him from service. (TR 424-26). According to Mr. Golombeski, Mr. Coates never mentioned anything about going to a hospital. (TR 424-26). Mr. Coates testified he planned to write the statement during his lunch break and that he informed Mr. Golembeski he was going to the hospital, which he did. (TR 109). Mr. Coates also told his engineer and yardmaster that he was going to the hospital. (TR 110). He drove to the hospital and was seen for tachycardia and told to see his family physician within five days. (TR 111). Mr. Coates admitted he had not had heart problems before or after this event. (TR 181).

The December 21 and 22, 2010, incidents resulted in an investigative hearing required by the CBA for insubordination on December 30, 2010. (CX 1A). After reviewing the hearing results, on January 14, 2011, Mr. Tassin imposed a 30-day unpaid suspension on Mr. Coates, which the latter served December 22, 2010 through January 20, 2011. (CX 1A). On January 12, 2011, Mr. Coates filed his first FRSA whistleblower complaint.[5] Mr. Coates returned to work on January 20, 2011. He testified that he ran into Mr. Golombeski at the Rouge Yard office, who asked if he would be a good worker, and informed him of his FRSA complaint whereupon he believed the latter appeared angry, but said nothing. (TR 118). Mr. Golombeski testified it was possible he was informed of the FRSA complaint, but had not recalled that at his own deposition. (TR 326).

Mr. Coates testified that thereafter he believed he received increased supervision by trainmasters, such as Mr. Golombeski, Mr. Trevillion, Mr. Wright, and Mr. Mueller. (TR 118; TR 341). He felt "targeted" with constant harassment. (TR 110). However, on cross-examination he admitted that he had not seen Mr. Golombeski at the Rouge Yard too often and that neither Mr. Golombeski nor the other trainmasters followed him around. (TR 190-91). Mr. Golombeski testified he spent from five to six days a month at the Rouge Yard. (TR 320). He had assigned trainmasters to manage 229 for improvements after discussing the timeliness of

[5] The complaint was dismissed by an ALJ on June 10, 2011. (RX D; RX E). RX B are the Secretary's Findings, dated April 4, 2011.

the job with them and had them conduct time studies. (TR 341-42). Eventually, based on those time studies, he changed the operating plan. (TR 440).

On March 10, 2011, Mr. Coates had worked about fourteen hours, until 9:15 AM. (TR 121). He was called back in for work at 9:30 PM. (TR 123). He had worked this particular assignment regularly. (CX 2 at 18). The engineer on his crew, Mr. Perry Bonner, was to be in at 9:15 PM. (TR 123). Upon completion of their workday at 9:15 AM, Mr. Coates testified he stayed, at the Rouge Yard and spoke with the yardmaster, as was his custom. (TR 124-25). He added that he usually called-in his off duty time from the yard. (TR 291-92). In fact, March 11, 2011 was the only time he had not done so. (TR 292). The yard had a CTW computer terminal referred to as the CATS system, which was available for use to sign out. (TR 198). When a GTW employee worked twelve hours or more the "punch-out" at their final destination was referred to as a "quick-tie." (TR 198). Mr. Tassin testified that there is no reason an employee having access to a CATS terminal should telephone in their tie-up, other than perhaps to avoid the imprinted time stamp that CATS records. (TR 501-02). Both Mr. Coates and engineer Bonner left the yard in a taxi provided by GTW to return to their home stations. (TR 198). Mr. Bonner called in and reported work ended at 9:15 AM and his "tie-up" (off-duty) at 10:25 AM. (TR 70). Mr. Coates testified he went home, fell asleep, and only reported his "tie-up" as 10:30 AM, when he awoke at 2:49 PM EST. (CX 2 at 21; TR 201). Transcripts of both calls were admitted. Mr. Coates testified he thought no more of it. (TR 128).

On March 11, 2011, Mr. Golombeski who happened to be at the Rouge Yard looking for crews who had met the mandatory rest times and could be assigned work, and Trainmaster Mr. Trevillion noticed Mr. Coates had not tied-up upon completion of his work. (CX 2 at 34). The crew dispatcher informed him the latter had just tied-up. (TR 444). Mr. Coates' tie-up time "stuck-out" to him because Mr. Coates had not tied-up for three to four hours post-work. (TR 445). Mr. Bonner was entitled to "deadhead" credit time from the Rouge Yard back to his home area, Hamtramck, whereas Mr. Coates was not entitled to any such credit. (CX 2 at 22). So, Mr. Coates' tie-up time should have been five minutes earlier than Mr. Bonner's.

As a result of the incorrect tie-up time report, on March 14, 2011, Mr. Coates was noticed by Trainmaster Erik Wright for an investigative hearing related to "stealing time." (RX FF). The investigative hearing, after several delay requests, was finally conducted on September 9, 2011. (CX 2). At the investigative hearing, Mr. Coates testified, "What happened that day in question was a clear mistake on my behalf. I admit that." (CX 2 at 52). He denied any attempt to lie or deceive. (CX 2 at 94). He further explained that he had been working long days prior to then and never realized he had erred in his tie-up until notified of the investigation. (CX 2 at 52). His testimony before me was essentially the same. (TR 233). At the investigative hearing, he expressed his belief that the charge was merely a "personal vendetta" by Mr. Golembeski due to his FRSA complaint. On redirect examination, Mr. Coates testified, at trial, that the rift between him and Mr. Golembeski had started in December 2010 before he had ever filed a FRSA complaint or had increased supervision. (TR 305-06). Mr. Trevillion, his supervisor testified, at the investigative hearing, that Mr. Coates got the work done and was a "good employee." (CX 2 at 61).

General Superintendent Tassin was the GTW official responsible for reviewing the results of the investigation, the investigative summary by Mr. Willett, and deciding upon any personnel action. (RX VV).[6] Based upon the September 9, 2011 investigation, on September 16, 2011, Mr. Tassin determined that Complainant's employment would be terminated for falsifying of time records and violating rules on March 11, 2011. (TR 36). Mr. Tassin admittedly judged the complainant's character, looked at his disciplinary history, and sought input from Mr. Golembeski. (TR 36). On September 14, 2011, Mr. Golembeski emailed Mr. Tassin comments about Mr. Coates being an unsatisfactory employee. (CX 6, Bates 419). He testified those comments were meant to question Mr. Trevillion's supervisory acumen with respect to the latter's evaluation of Mr. Coates at the hearing. (TR 388). Complainant was advised by letter dated September 16, 2011 and signed by Mr. Tassin that he was dismissed from employment with GTW. Mr. Tassin also belatedly came to the conclusion, after reading the transcript of the investigation, that Mr. Bonner had also falsified his tie-up time. (TR 62). However, the time had passed, under the CBA, to initiate action against him.[7] (TR 62). Mr. Tassin testified that Mr. Coates' FRSA complaints and his injury played no part in his decision; Mr. Coates was simply a "thief." (TR 504). Mr. Golombeski testified that Mr. Coates' report of injury and FRSA complaints played no role in his recommendations.[8] (TR 448-49). Mr. Tassin did not believe Mr. Coates' assertion that he had made an honest mistake for several reasons: first, he had a history of adding up overtime (hours); secondly, Mr. Coates could have tied-up using CATS, but likely did not because his time would have been recorded; and, third, Mr. Coates sounded alert (not groggy) in his telephone call to the dispatcher. (RX II; RX JJ).

Mr. Coates suffered a serious workplace injury on April 2, 2011. Mr. Golembeski completed an accident report about it. (CX 12; CX 13; CX 14). A period of convalescence was required between April 3, 2011 and August 31, 2011 when he was cleared for work. On April 5, 2011, GTW issued a Notice of Investigative Hearing to ascertain whether Mr. Coates had violated any work rules in relationship to the accident.[9]

Mr. Golombeski prepared comments in a Superintendent's Assessment after the complainant's April 2011 accident where he wrote: "(He) is a needs improvement employee who has an attitude toward the company and its supervisors. He is unable to work without the supervision of a company officer as he takes advantage of the company any way he can. He has been talked to about his behavior by never changed the way he acted while at work. Mr. Coates is a follower of his peers." (CX 14). However, he admitted that: the only demonstrated "attitude" he observed was towards him; the only taking advantage of the company referred to the 12/21/10 (tardiness) incident; the only one to have spoken to Mr. Coates was he himself; and, the comment about peers meant Mr. Coates was average compared to others at the Rouge yard. (TR 366-70). He also admitted his opinion was not similar to those of the other supervisors who had completed performance reviews found in CX 11. (TR 374).

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[6] Mr. Willet found violations of USOR-Rule H and Rule 100, but made no recommendations. (RX LL). April 4, 2011.

[7] Mr. Bonner testified at his deposition that he had previously made mistakes on the job and GTW had allowed him to correct them "many a times." (CX 25A at 63). He also testified Mr. Coates had told him he was "under the gun." (CX 25A at 65-66).

[8] Canadian National/GTW has a written policy of accident reporting without harassment or intimidation. (RX SS).

[9] GTW pointed out that this matter was never resolved. Thus, Mr. Golembeski testified that if Mr. Coates ever returned to work, the investigation would proceed.

Mr. Tassin had been the Assistant Superintendent at the Rouge Yard/Flat Rock years earlier (2005) when three employees, Messrs. Mihm, Kovacs, and Cousino, had been found to have falsified their tie-up times. (TR 78). The three opted for a waiver of the investigative hearing thus accepting responsibility for their actions and were not terminated. (CX 9, Bates 170, 190). They each received a six-month suspension. (TR 80). Mr. Mihm's discipline was administratively issued over Mr. Tassin's signature, although he had not made the decision in those cases. (TR 77). Mr. Tassin testified that those three should not be working for GTW today. (TR 79).

Mr. John Purcell, a GTW employee and chairman of Mr. Coates' local union, Local 1075, testified at the hearing. (TR 236). He had represented Mr. Coates at his September investigative hearing. (TR 236). He said he had tried to negotiate Mr. Coates' case with Mr. Golembeski, and Mr. Tassin but to no avail. (TR 236). He was aware of the Mihm, Kovacs, and Cousino cases and testified that he was aware of only one similar falsification case in the past eight years resulting in discharge, i.e., this complainant. (TR 265-69). He cited two instances where employees had reported incorrect tie-up times, self-reported it, and that ended the matter. (TR 257-58). However, he admitted that falsification can lead to termination. (TR 257).

Mr. Coates filed his present FRSA complaint on September 19, 2011.[10]

V. Federal Rail Safety Act

Pursuant to the FRSA, a railroad carrier cannot discharge or otherwise discriminate against an employee if such discrimination is based, in whole or in part, on the employee's lawful, good faith act, done or perceived by the employer to have been done or about to be done:
…

(3) to file a complaint, or directly cause to be brought a proceeding related to the enforcement of this part or, as applicable to railroad safety or security, chapter 51 or 57 of this titled, or to testify in that proceeding;

(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

49 U.S.C. § 20109(a)(3)-(4).

In addition, FRSA prohibits a railroad carrier from disciplining an employee "who is injured during the course of employment" and "request[s] medical or first aid treatment, or … follow[s] orders or a treatment plan of a treating physician…." 49 U.S.C. § 20109(c)(1)-(2). The term "discipline" means "to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record." *Id.*

Coates alleges that he engaged in protected activity during his employment with GTW, namely:

[10] RX A is the Secretary's Findings, dated September 27, 2012.

1) on January 3, 2011, Coates filed a FRSA complaint alleging that he was removed from service for having reported tachycardia, an illness that occurred on the job following a confrontation with Golombeski; and

2) on April 2, 2011, Coates filed an on-duty injury report after tripping on a foreign object and sustaining a serious head injury and concussion.

Coates further alleges that his termination on September 16, 2011 is causally related to the protected activity described above. Coates asserts that he suffered damages in the form of lost wages, lost time accrued toward seniority status, and other compensatory damages. Lastly, Coates asserts that he is entitled to an award of punitive damages.

FRSA incorporates by reference rules and procedures applicable to the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR-21") whistleblower cases, including the burden shifting framework. 49 U.S.C. § 20109(d)(2)(A). To establish a prima facie claim of retaliation under FRSA, Coates must show by a preponderance of the evidence that (1) he engaged in a protected activity as statutorily defined; (2) GTW knew or suspected that he engaged in that protected activity; (3) he suffered an adverse employment action; and (4) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse employment action. 29 C.F.R. § 1982.104 (e)(2)(i)-(iv). Coates' failure to prove by a preponderance of the evidence any one of these elements requires dismissal of his complaint. 29 C.F.R. § 1982.104(e)(1). A preponderance of the evidence is "[t]he greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037 at 13 (ARB Jan. 31, 2006); *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 5 (ARB Feb. 29, 2012); *Clemmons v. Ameristar Airways, Inc.*, ARB Nos. 05-048, 05-096, ALJ No. 2004-AIR-11 (ARB June 29, 2007).[11]

In the course of concluding whether a complainant has proved by a preponderance of the evidence that the protected activity contributed to the adverse action, "[t]he ALJ (and ARB) may then examine the legitimacy of the employer's articulated reasons for the adverse personnel action." *Menefee v. Tandem Transp. Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 6 (ARB Apr. 30, 2010). Thereafter, and only if, the complainant has met its burden, does the employer face its burden. *Id.* The employer's burden is to demonstrate, by clear and convincing evidence, that it would have taken the same adverse action notwithstanding complainant's engagement in protected activity. *Id.*; 29 C.F.R. § 1982.109(b); *see also DeFrancesco*, ARB No. 10-144, slip op. at 5. With this framework in mind, I turn first to each of the elements that Coates must show by a preponderance of the evidence, and then turn to GTW's defense.

[11] *Cf. Araujo v. New Jersey Transit Rail*, 708 F.3d 152 (3d Cir. 2013) (providing a legislative history of the FRSA and asserting that Congress intended to make it difficult for railroads to escape liability when protected activity leads to adverse action).

A. Prima Facie Case

1. Protected Activity

The OSHA Complaint

The parties dispute whether Coates engaged in protected activity under FRSA. GTW asserts that Coates filed the January 2011 OSHA complaint in bad faith, and as a result, the filing is not protected activity pursuant to § 20109(a). Resp't Post-Hr'g. Br. 21-23. GTW asserts that Coates filed the OSHA complaint in bad faith because he: (i) allegedly gave false information; (ii) the underlying facts did not support a complaint within the meaning of the plain language of § 20109(c); and (iii) he ultimately withdrew his appeal.

GTW cites a single case from the Northern District of Mississippi for the proposition that claimants who provide false information in a complaint make that complaint in bad faith for purposes of § 20109(a). In that case, a claimant had failed to disclose during an arbitral proceeding how an injury occurred. *Grimes v. BNSF Rly. Co.*, Civ. No. 1:12CV137-DAS at *3 (N.D. Miss. 2013). Instead of truthfully reporting that the injury was the result of an employee rules violation, the claimant falsely reported that the injury was the result of an accident. *Id.* at *2. Thus, the District Court held that the plaintiff was collaterally estopped from arguing that he reported his injury in good faith. *Id.* at *7. Assuming, *arguendo*, that this case stands for the proposition that claimants who falsely report protected activity make their complaints in bad faith for purposes of § 20109(a), GTW's argument still fails because Coates did not falsely report protected activity.

GTW asserts that Coates misstated the date that he learned of his investigatory hearing, the nature of the charges against him, and the nature of his punishment. Regardless of whether Coates misstated any of these facts, he did not materially misstate the nature of his protected activity as the employee did in *Grimes*. Coates truthfully reported his incident with Golombeski, his departure from work to the hospital, and his diagnosis of tachycardia. His misstatement of collateral *facta* cannot amount to bad faith under *Grimes* or § 20109(a).

GTW next asserts that aside from any misstatement, Coates filed his claim despite the contrary plain meaning of § 20109(c) and thereby demonstrated bad faith. Resp't Post-Hr'g. Br. 21-22. Section 20109(c) prohibits railroad carriers from "deny[ing], delay[ing], or interfer[ing] with medical or first aid treatment of an employee who is injured during the course of employment, or following the orders of a treating physician." GTW first notes that it did not deny, delay, or interfere with Coates' treatment for tachycardia. It then notes that it did not deny, delay, or interfere with Coates' following the orders of a treating physician, for no orders were yet issued to Coates at the onset of his tachycardiac symptoms. The argument fails, however, because while it focuses on the plain meaning of § 20109(c)(1), it ignores the plain meaning of §§ 20109(a)(4) and (c)(2). The former protects "notif[ying] … the railroad carrier … of a work-related personal injury or work-related illness." The latter prohibits disciplining an employee "for requesting medical or first aid treatment…." Coates' OSHA claim involved requesting medical treatment and notifying GTW of tachycardia, the symptoms of which he experienced during the course of his employment. Whether the claim was later denied on the basis of his

illness not being work-related has little bearing on whether Coates first approached the decision to file his claim in good or bad faith. Coates could have reasonably believed that his tachycardia was work-related as required by § 20109(a)(4). *See, e.g., Bala v. Port Authority Trans-Hudson Corp.*, ARB No. 12-048 (Sept. 27, 2013) (employee who reports a work-related injury that is aggravated at home engages in protected activity under FRSA). Furthermore, he requested medical treatment, which is unqualified protected activity pursuant to § 20109 (c)(2). The plain language of §§ 20109(a)(4) and (c)(2) could therefore support the good faith filing of a claim.

Lastly, GTW asserts that I should infer that Coates filed his claim in bad faith because he later withdrew his appeal. Resp't Post-Hr'g. Br. 22. As discussed above, the record does not support a finding that Coates filed his claim in bad faith. Here it is worth mentioning that the record bears evidence uniformly to the contrary – that Coates filed the OSHA complaint in good faith. Coates consulted with his local union chairman, John Purcell, and questioned whether the claim was worth filing. (TR 113). Purcell advised Coates that "he may have a claim" and directed him to an OSHA fact sheet. (TR 240-42; CX 23). The *Bala* case, which further clarified whether an injury is work-related, was decided after Coates' filed his claim – a fact consistent with Coates' good faith uncertainty surrounding the outcome of his own claim. For all these reasons, I find that Coates filed the January OSHA claim in good faith.

More fatal to GTW's argument is that the filing of the earlier OSHA claim is protected activity for purposes of Coates' present claim regardless of its success. The outcome of the earlier OSHA claim simply does not matter because § 20109(a)(3) does not require a claim to succeed in order for its filing to be protected.[12] While failure may indicate bad faith, failure is certainly not determinative of bad faith. GTW confuses a necessary condition for a sufficient one.

Turning from the question of good faith, I now address the activity itself. Coates filed the OSHA complaint alleging that he was removed from service due to an illness. He testified that he thought he could not perform his job safely. (TR 116). Upon arriving at the hospital, he was diagnosed with tachycardia. To file a complaint related to the enforcement of railroad safety or the acquisition of prompt medical attention is protected activity pursuant to §§ 20109(a)(4) and (c)(2). As a result, I find that the January OSHA complaint is protected activity.

[12] The ARB has recently construed notification of a work-related illness pursuant to § 20109(a)(4) as a "good faith act" arguably eliminating the need for evaluating whether notification of an illness was done in good faith or bad faith. *DeFrancesco*, ARB No. 10-114, slip op. at 7-8 ("The statute provides that a 'good faith act' *includes* 'notify[ing]' his employer of 'a work-related personal injury.'") (Emphasis added.). Under this construction, the acts enumerated in § 20109(a) are acts done lawfully and in good faith by definition. For example, refusing to violate a Federal law (enumerated act (a)(2)) is a "lawful, good faith act" pursuant to § 20109(a) and its construction in *DeFrancesco*. Indeed, it is difficult to imagine a bad faith refusal to violate Federal law. The confusion arises when considering that there can exist a rogue employee who files a complaint or series of complaints (enumerated act (a)(3)) in bad faith. When applying the whole act canon, § 20109(b)(1)(A) appears to support a construction that a fact-finder must determine whether filing a complaint as described in (a)(3) is done in good faith: "[discrimination is prohibited for] reporting, *in good faith*, a hazardous or security condition." (Emphasis added.). *See Santiago v. Metro-North Commuter Railroad Co., Inc.*, ARB No. 10-147, ALJ No. 2009-FRS-11, slip op. at 9 (ARB July 25, 2012) (noting the parallel structure of § 20109(a), (b), and (c)). However, the issue here is not whether the present complaint was filed in good faith, but whether the filing of an earlier complaint that had been fully litigated was filed in good faith and is protected activity. I note that an inquiry into good faith may require the parties to re-litigate the earlier claim, which is one reason why the District Court in *Grimes* found the employee collaterally estopped from showing good faith.

The Injury Report

The parties do not dispute whether Coates filed the April 2, 2011 injury report in good faith. Coates filed the report as a result of tripping over a foreign object at his post and sustaining a severe head injury and concussion. (TR 132). To notify the railroad carrier of a work-related personal injury is protected activity pursuant to § 20109(a)(4). *DeFrancesco*, ARB No. 10-114; *Henderson*, ARB 11-013; *cf. Bala*, ARB No. 12-048. As a result, I find that the April 2 injury report is protected activity.

2. Knowledge

The person taking adverse action must have been aware, or suspected, that the complainant engaged in protected activity. *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 6 (Jan. 31, 2006) (employee must show by preponderance of the evidence that person making adverse employment decision had knowledge of the protected activity); *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 14 (Jan. 30, 2004) (same). Tassin read Coates' termination hearing transcript before he made the decision to terminate Coates. (TR 32-33; 383-85). The transcript directly referenced the January OSHA complaint and April 2 injury report. (CX 2 at 9). As a result, Tassin had knowledge of Coates' protected activities.

3. Adverse Action

The standard for determining whether something is an adverse action is whether a reasonable employee in the same circumstances as the plaintiff would be dissuaded from engaging in protected activity. *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). One of the considerations in determining whether an action is materially adverse is its effect on pay, terms, and privileges of employment. Other considerations include the permanency of the action, other consequences, and the context within which the action arises. *Id.* at 69. Coates was discharged from service, held out of service, and experienced a negative change in attitude directed towards him (described *infra*). He therefore establishes this element.

4. Contributing Factor

A complainant must establish by a preponderance of the evidence that the protected activity was a contributing factor to the retaliatory discrimination, not the sole or even predominant cause. *Rudolph*, ARB No. 11-037, slip op. at 16 n. 47; *see also Araujo*, 708 F.3d at 152. The ARB has explained that a contributing factor includes "*any factor* which, alone or in connection with other factors, tends to affect in *any way* the outcome of the [adverse employment] decision." *DeFrancesco*, ARB No. 10-029, slip op. at 6 (emphasis added); *see e.g., id.*, slip op. at 7 (credible evidence that employee report of a slip and fall injury led employer to investigate for safety violations was a contributing factor); *Henderson*, ARB No. 11-013, slip op. at 14 (credible evidence that employee report of back pain led employer to investigate for its timely filing was a contributing factor); *Clark v. Airborne, Inc.*, ARB No. 08-133, 2005-AIR-027 (employee memos discussing safety concerns during company downsizing was not a contributing factor). Further, "the causation question is not whether a respondent had

good reasons for its adverse action, but whether the prohibited discrimination was a contributing factor." *Henderson*, ARB No. 11-013, slip op. at 11.

The contributing factor element "may be established by direct evidence or indirectly by circumstantial evidence." *Id*., slip op. at 6-7. Circumstantial evidence may include:

> temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity.

Id. slip op. at 7. "Standing alone, temporal proximity, pretext, or shifting defenses may be insufficient to establish by a preponderance of the evidence that a complainant's protected activity contributed to his employer's adverse action." *Clemmons*, ARB No. 08-067, slip op. at 10-11. However, the totality of the evidence may nonetheless support a finding of causation. *Id.* Furthermore, failure to consider the totality of circumstantial evidence of the causal relationship between protected activities and adverse actions is reversible error. *Rudolph*, ARB No. 11-037, slip op. at 15.

When a complainant makes an inferential case of discrimination by means of circumstantial evidence, "[t]he ALJ (and ARB) may then examine the legitimacy of the employer's articulated reasons for the adverse personnel action in the course of concluding whether a complainant has proved by a preponderance of the evidence that the protected activity contributed to the adverse action." *Menefee*, ARB No. 09-046, slip op. at 6. Thus the non-discriminatory reasons are evaluated contemporaneously with a determination of whether the protected activity contributed to the adverse action. "Thereafter, and only if, the complainant has proven discrimination by a preponderance of the evidence, does the employer face a burden of proof." *Id.*; *see also Brune*, ARB No. 04-037, slip op. at 14 (explaining that employer's burden of proof arises after, and only if, complainant establishes discrimination by preponderance of evidence). Thus, I evaluate the legitimacy of GTW's articulated reasons for terminating Coates in the course of determining whether he has shown by a preponderance of the evidence that his protected activities contributed to his termination.

Temporal Proximity

Determining what is temporally proximate "is not a simple and exact science but requires 'fact-intensive' analysis." *Franchini v. Argonne Nat'l. Lab.*, ARB No. 11-006, 2009-ERA-014, slip op. at 10 (Sept. 26, 2012) (citing *Hicks v. Forest Preserve Dist. Of Cook Cnty.*, 677 F.3d 781, 789 (7th Cir. 2012) for the proposition that there are no "bright line rules to apply when considering temporal proximity of adverse actions to protected activities"). On the other hand, an ALJ may contemplate case law to develop some general parameters of strong and weak temporal relationships, but the context surrounding the present claim plays a significant role. *Id.*, slip op. at 10. A range of five months has been suggested as sufficient to support an inference of unlawful discrimination. *Barker v. UBS AG*, 888 F.Supp.2d 291, 301 (D. Conn. 2012) (SOX

case). Thus the context surrounding Coates' dismissal may truncate or elongate a generalized five month range.

Coates drafted the OSHA complaint January 3, 2011, which was formally filed on or about January 19, 2011. (TR 113; CX 20). The complaint was dismissed April 4, 2011, and Coates immediately appealed. (RX B). On June 6, 2011, an administrative law judge dismissed Coates' complaint upon withdraw by Coates. (RX D; RX E). Coates filed the injury report April 2, 2011. (CX 12). Coates was dismissed on September 16, 2011. (ALJ Exhibit I). The temporal gap between the day Coates drafted the OSHA complaint and his dismissal is approximately eight and half months. The temporal gap between the day Coates filed the injury report and his dismissal is approximately five and half months. Given the range of five months supported in the case law, and given the other circumstantial evidence that favors a finding of causation discussed *infra*, I find that five and half months is sufficient to support an inference of unlawful discrimination here. On the other hand, the January OSHA complaint, which was filed eight and half months prior to termination, is not temporally proximate to support an inference of unlawful discrimination.

Inconsistent Application of Employer Policy

Tassin dismissed Coates for falsifying his off-duty time. (CX 2A). However, Tassin and Golombeski testified that Bonner had additionally falsified his off-duty time during the same March 11, 2011 incident. (TR 62; TR 359-60). Tassin further testified that Golombeski had likely failed to realize that Bonner had falsified his tie-up time due to inexperience, and that when Tassin and Golombeski finally realized Bonner's violation, it was too late to punish Bonner under the terms of the Collective Bargaining Agreement ("CBA"). (TR 62). GTW asserts that Coates and Bonner are not similarly situated because GTW discovered Bonner's violation after a lengthy delay, and because delayed prosecution of Bonner would violate the CBA. Resp't Post-Hr'g. Rep. Br. 14. This critical difference, according to GTW, confutes a showing of inconsistent application of employee policy. GTW confuses application of two different employee policies, however. While Bonner was dissimilarly situated for purposes of dismissal given the delay, he was nonetheless similarly situated for purposes of the initial investigation. Coates and Bonner were subject to the same standards, i.e. rules against falsifying time, and they engaged in materially the same conduct, i.e. falsifying time. Golombeski chose to investigate Coates, and not Bonner. Whether Golombeski chose to investigate one and not the other was due to his inexperience, as contends Tassin (TR 62), or due to influence from the January OSHA complaint, as contends Coates (Compl. Post-Hr'g. Br. 38), Golombeski's choice nonetheless amounted to an inconsistent application of employee policy.

The parties dispute whether GTW's decision to not terminate Mihms, Kovacs, and Cousino upon a finding of falsification of their tie-up times amounts to inconsistent application of employee policy. GTW asserts that they were not similarly situated to Coates because Tassin did not decide their punishment. Resp't Post-Hr'g. Rep. Br. 15. Tassin further testified that Mihm, Kovacs, and Cousino should have been dismissed. While Mihm's discipline was administratively issued over Tassin's signature, Tassin testified that he had not made the decision in that case. (TR 77). Given that I find this testimony credible, and that Tassin did not administer the punishment of Kovacs and Cousino, I find that the suspension of Mihms, Kovacs,

and Cousino, when compared to the termination of Coates, is not an inconsistent application of employee policy.

Lastly, the parties dispute whether GTW's decision to hold Coates out of service because of a lapse in Coates' three-year rules qualification requirement is an inconsistent application of employee policy. Coates notes that another conductor under Golombeski's supervision, Douglas Cross, was not held out of service because of a lapse in his three-year rules qualification requirement while he was off-duty due to personal injury. (CX 24 at 7). Golombeski testified that he was at least somewhat responsible for checking whether both Coates and Cross were rules qualified. (TR 458). GTW asserts that allowing Cross to return to work was an isolated mistake made by Golombeski, and that it does not rise to the level of inconsistent application of employee policy. Resp't Post-Hr'g. Br. 27. Isolated mistake or not, Cross was permitted to return to work unqualified while Coates was not. The record therefore demonstrates an inconsistent application of how GTW treats rules expiration, a circumstance in support of causation.

Shifting Explanations

An employer's shifting explanations for adverse action support a finding of causation. *Clemmons*, ARB No. 08-067, slip op. at 10 (employer's shifting defenses for decision to terminate employee supports a finding of causation); *Douglas v. Skywest Airlines, Inc.*, ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-14, slip op. at 18 (ARB Sept. 30, 2009) (same).

Coates argues that Tassin shifted his explanations for terminating him. Compl. Post-Hr'g Resp. Br. 7-11. However, Coates confuses Tassin's explanations for termination with Tassin's explanations for not believing that Coates had made an honest mistake during the March 11 incident. Coates first notes that Tassin testified that he relied heavily on his impression that Coates had a bad character, which indicated that Coates had lied and should be dismissed. (TR 65-67). Coates then points out that Tassin had earlier testified that he dismissed Coates solely on the basis of the investigation transcript and exhibits, which stated nothing of Coates' character. (TR 35-37). As stated by Tassin, if Coates had "a clean record, he would be dismissed." (TR 37). Yet later, Tassin testified that the reason he believed Coates had lied was because Coates telephoned his tie-up time instead of using a physical terminal that produces a timestamp. (TR 501-02).[13] Tassin and GTW proffered all of these reasons for believing that Coates had lied about whether he had made an honest mistake. Resp't Post-Hr'g Br. 24-25. GTW asserts that the only reason Tassin *terminated* Coates was because Coates falsified his tie-up time. Resp't Post-Hr'g Resp. Br. 13. Throughout the record, Tassin consistently maintained that he did not believe that Coates had made an honest mistake when he tied-up. Instead, Tassin maintained that Coates had lied. While the record demonstrates a shift in explanations for why Tassin ultimately decided to terminate Coates, it does not demonstrate a shift in the precise reason for

[13] Before proffering this reason, Tassin said that Coates' voice during the telephone call revealed deception. Tassin testified that Coates' voice was alert and flirtatious, which runs counter to Coates' testimony that he had recently awakened. (TR 502). However, it is unrefuted that Tassin had never met Coates and was unfamiliar with his idiom. (TR 39). In addition, a recording of the call reveals that the dispatcher initiated the banter and that Coates responded in kind. (EX II). This undercuts the theory that Coates was alert and flirtatious, and thus untruthful.

termination. As a result, I find that the record only weakly demonstrates a shift in explanations for adverse action taken.

Coates further argues that Tassin shifted the date upon which he decided to terminate Coates. Compl. Post-Hr'g Br. 11. Coates asserts that Tassin shifted the date in order to demonstrate that Golombeski did not influence his decision. However, the shifting date of the termination decision is immaterial to a finding of a shifting explanation for the adverse action. Coates has not shown that a shifting date in some way supports an inference that Tassin shifted his explanation for terminating him, to wit, that he falsified his tie-up time. While Coates has provided some circumstantial evidence supporting cat's paw culpability, he has not shown, on the basis of a shifting termination date, a shifting explanation for the underlying adverse action taken.

Change in Attitude

An employer's change in attitude toward an employee who engages in protected activity supports a finding of causation. *Jones v. United States Enrichment Corp.*, ARB Nos. 02-093, 03-010, ALJ No. 01-ERA-21, slip op. at 12 (April 20, 2004).

Coates argues that GTW changed its attitude towards him following the January OSHA complaint and the April 2 injury. Compl. Post-Hr'g. Br. 27. According to Coates, GTW increasingly monitored his work performance during the weeks following his complaint, which evidenced a negative change in attitude in response to his complaint. The parties do not dispute that monitoring was increased. However, GTW asserts that the increased monitoring was not due to the OSHA complaint, but rather due to client dissatisfaction in job performance and efficiency. Resp't Post-Hr'g. Rep. Br. 7. It further asserts that other work orders were monitored during the same time and for the same reason. Coates offers in response that GTW has not produced any documentation of client dissatisfaction and relies primarily upon the testimony of Golombeski. Given that the record shows that other work orders were monitored, I find that Coates has failed to show that the increased monitoring of his job performance evidences a change in attitude in response to his OSHA complaint.

Coates further argues that Golombeski's decision to investigate Coates and not Bonner following the falsification incident on March 11 evidences a change in attitude as a result of the January OSHA complaint. Compl. Post-Hr'g Br. 28. Coates notes that Golombeski immediately ordered his investigation without knowing the full facts surrounding the incident, including the time of departure from the Rouge, which Golombeski could have verified with a taxi receipt, and whether the discrepancy between Bonner's and Coates' time could have been a result of Bonner's mistake, and not Coates'. *Id.*; (TR 349-51). As mentioned above, Golombeski testified that he chose to investigate only Coates because he "stuck out" because he should have tied-up three to four hours earlier. (TR 353). However, given the temporal proximity between the complaint and the investigation, that Golombeski admittedly did not know the full facts surrounding the incident which could have been easily verified before initiating the full investigation, and that Golombeski did not consider the possibility that Bonner had also made a mistake, I find that the manner in which Coates' investigation began evidences a change in attitude towards Coates following the January OSHA complaint.

Next, Coates argues that the change in location of his dismissal hearing from onsite to offsite evidences a change in attitude as a result of filing his April 2 injury report. Compl. Post-Hr'g Br. 34. Prior to the April 2 injury report, the investigation was to be held in Flat Rock yard pursuant to the CBA, which requires investigations to take place as near as possible to the employee's home terminal. (TR 374-75). Following the injury report, Golombeski was coached by Tassin or another supervisor to hold the hearing offsite at a local Best Western hotel in order to avoid any negativity associated with dismissal. (TR 375, 377). Golombeski testified that no other intervening incident occurred between the March 11 falsification and the change in location other than the April 2 injury report. (TR 375). Coates thus submits that the change in location evidences a change in attitude as a result of the injury report. Compl. Post-Hr'g Br. 35. GTW argues that the March 11 charge was always serious, and that Golombeski merely failed to schedule the hearing offsite due to his inexperience. Resp't Post-Hr'g Reply Br. 9. However, Golombeski and Tassin communicated daily and Golombeski kept Tassin well-informed of his activities. (TR 29). I therefore find GTW's explanation that Golombeski was inexperienced poorly reasoned and that the change in hearing location evidences a change in attitude toward Coates as a result of the April 2 injury report, keeping in mind of course, that protected activity need only "tend to affect in any way the employer's decision." *DeFrancesco*, ARB No. 10-029, slip op. at 6.

Cat's Paw Liability[14]

The Supreme Court has held that when the discriminatory animus of a supervisor who influences, but does not make, the ultimate employment decision is "intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action taken, then the employer will be held liable." *Staub v. Proctor Hosp.*, 131 S.Ct. 1186 (2011). *Bobreski v. J. Givoo Consultant's, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 17 (June 24, 2011) (directing the ALJ to fully describe the supervisor's influence over the adverse employment decision and whether that influence was motivated by the employee's protected activity). Where, as here, the complainant need establish that the protected activity is only a contributing factor to the adverse employment decision, proof of motivation is not required. *Rudolph*, ARB No. 11-037, slip op. at 17-18 (citing *Klopfenstein v. PCC Flow Techs.*, ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 18 (ARB May 31, 2006)). In other words, proof of contributing factor on the basis of cat's paw liability may be established by showing that the protected activity was a contributing factor to the supervisor's act of influence over the decision-maker. *Rudolph*, ARB No. 11-037, slip op. at 17; *accord Staub*, 131 S. Ct. at 1192 ("[w]hen a decision to fire is made with no unlawful animus on the part

[14] Cat's Paw is a concept of agency derived from a fable of Aesop. See *Staub* 131 S. Ct. at 1190 n.1 for an overview of the fable and its applicability to employment law. Typically, a decision-maker or decision-making body attempts to shield itself from liability by claiming ignorance of the employee's protected activity and attributing any knowledge thereof to one of its agents, often a direct supervisor. Thus the decision-maker is said to use the supervisor's hand like a cat's paw. The employee need not show that the decision-maker knowingly used the supervisor to indirectly discriminate, nor otherwise held any knowledge of the targeted employee's protected activity. *Bartlik v. T.V.A.*, ALJ No. 1988-ERA-015, at n.1 (Sec'y, Apr. 7, 1993) ("[W]here managerial or supervisory authority is delegated, the official with ultimate responsibility who merely ratifies his subordinates' decisions cannot insulate a respondent from liability by claiming 'bureaucratic ignorance'.").

of the firing agent, but partly on the basis of a report prompted (unbeknownst to that agent) by discrimination, discrimination might perhaps be called a 'factor' or a 'causal factor' in the decision. . . .").

Here, it is not disputed that Golombeski inserted his opinions into GTW's investigative hearing by means of off-the-record communications with Tassin. On September 15, 4:31 p.m., Golombeski sent Tassin an excerpt of the hearing transcript where Trevillion gave positive opinions about Coates. (CX 6, Bates 419). To that excerpt, Golombeski appended his own negative opinions. (CX 6, Bates 419). GTW asserts that Tassin made the termination decision prior to receiving Golombeski's September 15 opinions. Resp't Post-Hr'g. Rep. Br. 12. Coates was terminated on September 16, 2011. (EX NN). Tassin testified that he made the termination decision on September 14. (TR 502-03). He further testified that he received the transcript of the investigative hearing on that date and made his decision immediately. (TR 502-03). However, Tassin earlier testified that he received the transcript on the September 13 and that he probably was not finished reading the transcript until after September 14. (TR 81, 84). He also stated that he made the termination decision on either September 15 or 16. (TR 82). By pretrial stipulation, the parties originally agreed that Tassin made the termination decision on September 16. (ALJ Exhibit 1). Given that stipulation and the inconsistency in Tassin's testimony, I find that Tassin made the termination decision on September 16 and was aware of Golombeski's negative opinions prior thereto.

Bobreski directs the ALJ to determine the magnitude of the supervisor's influence over the adverse employment decision. *Bobreski*, ARB No. 09-057, slip op. at 17 ("[I]t is critical for the ALJ to consider all of the circumstantial evidence and fully describe the level of influence [the supervisor] had over [the decision-maker's adverse employment decision]."). Tassin and Golombeski communicated with each other daily and had a close working relationship. (TR 315). Tassin testified that he sought input from Golombeski. (TR 36). Thus I find that Tassin was impressionable and susceptible to influence by Golombeski's negative opinions of Coates. Given the strong relationship between Tassin and Golombeski, I find that Tassin's decision to terminate Coates was influenced by Golombeski at an intermediate level. While GTW contends that Tassin solely based his decision on falsification of time, Tassin had to first decide whether Coates was lying about whether he had made an honest mistake. *Supra* at *18. I find that this threshold decision was influenced by Golombeski's negative opinions. Further, I find that Coates' protected activities were a contributing factor to Golombeski's formation of the negative opinions that influenced Tassin. That the protected activities were contributing factors is evidenced by Golombeski's decision to investigate Coates and not Bonner following the January OSHA complaint; that investigation's temporal proximity to the complaint, i.e. less than three months; and the hurried and unconsidered manner that Golombeski began the investigation.[15] That the protected activities were contributing factors is additionally evidenced

[15] GTW asserts that Golombeski had no knowledge of the January OSHA complaint and, as a result, the complaint could not contribute to any adverse employment action. Resp't Post-Hr'g Br. 23. Coates testified that upon his return to work near the end of January 2011, he told Trainmasters Trevillion and Wright and then Golombeski that he had filed the complaint. (TR 117). Given that he told Trevillion and Wright about his filing, Coates testified that he told Golombeski because he would have "found out anyway." (TR 117). Coates further testified Golombeski appeared visibly upset in response. (TR 118). Golombeski testified that he could not remember whether Coates told him of the complaint. (TR 325-26). Given that Coates' testimony is well-reasoned, I find it credible. As a result, I find that Golombeski was aware of the January OSHA complaint in late January.

by the negative supervisory assessment that Golombeski sent to Tassin following the April 2 injury report and Golombeski's decision to hold Coates and not Cross out of service on the grounds of rules expiration. As a result, I find that Coates' protected activities were contributing factors to Golombeski's formation of negative opinions, and his act of influence over Tassin's decision to terminate Coates. A cat's paw theory of respondent culpability therefore applies.

Legitimacy of Respondent's Articulated Reasons

GTW argues that it fired Coates only because he falsified his tie-up time, an act for which Tassin has zero tolerance. Resp't Post-Hr'g Rep. Br. 13. However, GTW originally scheduled the investigative hearing for the falsification incident onsite, a location where it generally does not terminate its employees. (TR 374). After the April 2 injury report, GTW moved the hearing location offsite, where it generally prefers to terminate its employees if necessary. (TR 375-76). GTW asserts that Golombeski made a mistake when he initially scheduled the hearing onsite. Resp't Post-Hr'g. Rep. Br. 9. However, I find this explanation poorly reasoned given the daily communication between Golombeski and Tassin, their close working relationship, and the fact that Golombeski kept Tassin well-informed of his activities. In an earlier brief, GTW argued that it fired Coates not only because of the falsification incident, but also because he was a bad employee with a history of discipline. Resp't Post- Hr'g Br. 26. The record does not reveal that Coates was a bad employee with a history of discipline. As discussed above, Coates had a mixed history with GTW; his tenure had its ups and downs.[16] This fact runs counter to a theory of dismissal based upon performance. In any case, GTW now articulates the singular reason of falsification. Its inconsistent argument discredits the legitimacy of that reason. In conjunction with the circumstantial evidence favoring complainant, i.e., the temporal proximity of the April 2 injury report to Coates' termination; the shifting explanations for Tassin's belief in Coates; the inconsistent application of employee policy manifest by Golombeski's decision to investigate Coates and not Bonner; the inconsistent application of employee policy manifest by holding Coates and not Cross out of service on the basis of rules expiration; the change in attitude manifest by the manner in which the investigation of the March 11 incident began; the shuffling of the September 9 hearing location; and lastly, the application of cat's paw culpability discussed immediately above, I find that Coates has established by a preponderance of the evidence that his protected activities contributed to his termination.

B. Respondent's Burden

Coates has established each of the elements of a prima facie case of retaliatory discrimination under FRSA by a preponderance of the evidence. *Supra* § V.A.1-4. GTW has not met its burden of producing a legitimate non-discriminatory reason for Coates' termination.

[16] Coates' discipline history includes insubordination to Golombeski in relation to the December 22 incident. The record also contradicts that insubordination to Golombeski was a legitimate reason for adverse action. Tassin testified that he believed if a supervisor required an employee to provide a written statement for tardiness, then that statement should be delivered to the supervisor the following day. (TR 52). Because Coates left work for the hospital and was immediately pulled from service, Coates was unable to provide the written statement the following day. He did not return to service until the investigative hearing related to the alleged insubordination had already taken place. (TR 52-53).

Thus Coates is entitled to a presumption of retaliatory discharge.[17] In order to avoid liability, GTW must prove by "clear and convincing evidence that it would have taken the same adverse action in the absence of any protected behavior [shown by Coates]." 29 C.F.R. § 1982.109(b); *DeFrancesco*, ARB No. 10-144, slip op. at 5 (citing *Menefee*, ARB No. 09-046, slip op. at 6, for the application of the clear and convincing standard to the employer).

Clear and convincing evidence is "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain." *Brune*, ARB No. 04-037, slip op. at 14. The administrative law judge must assess not whether the employer's policies and decisions have a rational basis, but whether they are "so powerful and clear that [adverse action] would have occurred apart from the [employee engaging in] protected activity." *Henderson v. Wheeling & Lake Erie Rwy.*, ARB Case No. 11-013, 2010-FRS-012, slip op. at 15. It follows that an employer may show various business reasons or other rationales for adverse action yet nonetheless fail to meet its evidentiary burden.

GTW asserts that Tassin would have terminated Coates regardless of his engagement in protected activity. Resp't Post-Hr'g Rep. Br. 17. Tassin testified that he has zero tolerance for dishonestly falsifying time. (TR 36). At the September 9 hearing, Coates candidly admitted that he reported his time incorrectly, but by mistake. (CX 2 at 52). Tassin testified that he did not believe Coates. (TR 65). However, Tassin shifted his reasons for disbelief. *Supra* § IV.A.4. While Tassin never shifted his falsification rationale for termination, he nevertheless shifted the underlying reasons for his belief that Coates had falsified, and had not truthfully made, an honest mistake. As a result, I discredit his testimony. Further, the September 9 hearing was originally scheduled onsite, a fact inconsistent with a zero tolerance policy. While GTW claims that Golombeski made a mistake, and that the hearing should have initially been scheduled offsite, I find this explanation poorly reasoned given the close working relationship and regular communication between Tassin and Golombeski. The record establishes that the hearing location was changed after Coates had filed the April 2 injury report. All of these facts oppose a powerful and clear showing that GTW would have terminated Coates in the absence of his engagement in protected activity. *Brune*, ARB No. 04-037, slip op. at 14; *Henderson*, ARB Case No. 11-013, slip op. at 15.

In addition, Bonner testified that when he had made mistakes, GTW had given him the opportunity to correct them "many a times." (CX 25 at 63). Coates was offered no like opportunity. Bonner further testified that Coates had told him that he was "under the gun." (CX 14 at 65). The record demonstrates that Coates was, in fact, under the gun. Coates was immediately investigated for stealing time while Bonner was not. Coates was held out of service for rules expiration while Cross was not. These facts, too, oppose a convincing and clear

[17] If GTW had instead met its burden of production, the presumption would have "drop[ped] out of the picture," and Coates would bear the burden to prove that GTW's reasons were pretextual. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993). Perhaps more accurately, the presumption would have never entered the picture. As the ARB has explained in *Menefee*, the ALJ may consider the non-discriminatory reasons proffered by the employer *in the course of* determining whether the complainant has established causation by a preponderance of the evidence. This implies that if GTW had produced sufficiently legitimate reasons, then Coates would not have established causation. Without causation, Coates would have never established a prima facie case. Thus the presumption would have never entered the picture. *See Menefee*, ARB No. 09-046, slip op. at 6; *see also Brune*, ARB No. 04-037, slip op. at 14.

showing that GTW would have terminated Coates in the absence of his engagement in protected activity.

Indeed, in order to prove that the protected activities of Coates played no role in Tassin's decision, GTW offers as affirmative evidence Tassin's own testimony of his zero-tolerance policy. That testimony, for the reasons I discuss above, lacks credibility. GTW has otherwise provided no evidence of Tassin's zero-tolerance policy, for example, through evidence of past decisions by Tassin or a written policy distributed to employees.

GTW's earlier argument, that it terminated Coates because of his poor work history and the falsification incident, still does not prove by clear and convincing evidence that GTW would have terminated Coates irrespective of the January OSHA complaint and the April 2 injury report. Golombeski's negative assessments of Coates and his negative off-record communications with Tassin during the September 9 hearing follow, and not precede, Coates' protected activities. In addition, Golombeski testified that his assessment that Coates had a bad attitude toward his supervisors was based upon his own interaction with Coates, and not upon his knowledge of Coates' interaction with other supervisors. The assessment is therefore poorly reasoned, and I discredit it. With respect to the comments given to Tassin during the hearing, they were in opposition to Trevillion's positive assessment of Coates. Given the temporal proximity of the assessments to the protected activities and their poorly reasoned and opposing contents, I find that Golombeski's negative assessments do not reflect Coates' actual performance. As already mentioned, I find Coates' earlier work history mixed, and not negative. As a result, I find that his work history as a whole, and taken in conjunction with the falsification incident, does not so powerfully and clearly demonstrate that GTW would have terminated Coates in the absence of his engagement in protected activity. In sum, GTW has failed to satisfy its burden with clear and convincing evidence.

VI. Remedy

The FRSA provides in general that "[a]n employee prevailing in any action under subsection (d) shall be entitled to all relief necessary to make the employee whole." § 20109(e)(1). Relief 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.

§ 20109 (e)(2). Furthermore, "[r]elief in any action under subsection (d) may include punitive damages in the amount not to exceed $250,000." § 20109 (e)(2); *see also* 29 C.F.R. § 1982.109(d)(1).

Reinstatement

Coates has already been reinstated. Compl. Post-Hr'g Rep. Br. 16. Immediately following a hearing that was conducted pursuant to Coates' contractual claim filed through his union under the Railway Labor Act, 45 U.S.C. § 151, *et seq.* ("RLA"), the arbitrator ordered by way of an interim award that Coates return to work. Compl. Post-Hr'g Rep. Br. 16. The award further stipulated that Coates be reinstated with no loss in seniority status. Compl. Post-Hr'g Rep. Br. Ex. 7.

Loss of Wages

The award noted that "[b]ackpay, if any, will be addressed in the full award to follow at a later date." Compl. Post-Hr'g Rep. Br. Ex. 7. A railroad employee's contractual remedy under RLA does not preclude recovery under FRSA. *Mercier v. Union Pacific R.R. Co.*, ARB No. 09-121, slip op. at 6 (Sept. 29, 2011). However, duplicate damages may not be awarded. § 20109(e)(1) (prevailing employee is entitled to all relief necessary "to make the employee whole"). To the extent that the forthcoming RLA order awards Coates lost wages, he is not entitled to recovery of those wages under FRSA. Alternatively, Coates may be entitled to such recovery if he has attempted to mitigate with "reasonable diligence." *Douglas v. Skywest Airlines, Inc.*, ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-14, slip op. at 20 (Sept. 30, 2009); *see also Roberts v. Marshall Durbin Co*., ARB Nos. 03-071, -095, ALJ No. 2002-STA-035, slip op. at 17 (Aug. 6, 2004). The respondent bears the burden of proving that the complainant failed to mitigate. *Douglas*, ARB Nos. 08-070, 08-074, slip op. at 20; *Dale v. Step 1 Stairworks, Inc*., ARB No. 04-003, 2002-STA-030, slip op. at 7 (Mar. 31, 2005). The employer satisfies this burden "by establishing that comparable jobs were available and that the employee failed to make reasonable efforts to find substantially equivalent and otherwise suitable employment." *Douglas*, ARB Nos. 08-070, 08-074, slip op. at 20; *Hobby v. Ga. Power Co*., ARB Nos. 98-166, -169, ALJ No. 1990-ERA-030, slip op. at 50 (ARB Feb. 9, 2001). Thus, GTW must show that comparable jobs were available *and* that Coates failed to make reasonable efforts to find substantially equivalent and otherwise suitable employment.

GTW argues that Coates did not mitigate his backpay damages because "[h]e did not apply for a single railroad position during the two years he was unemployed, even though positions were available." Resp't Post-Hr'g Rep. Br. 16. Coates testified that there are Class I railroads in Michigan, but that he never looked for a position with those railroads. (TR 226). He also testified that he was unaware of the website railserve.com and that he had not looked for jobs on various internet job search websites or the newspaper. (TR 227). Coates testified that he only applied for positions with the State of Michigan, Home Depot, and Lowes. (TR 144-45). He further testified that he could not find any job in the Detroit area. (TR 145). Coates notes that is forty-nine years old and has worked for GTW since 1998. Compl. Post-Hr'g Rep. Br. 18. His specialized skills are limited therefore to the railroad industry. He argues that GTW would be his last and only railroad employer and that it would have been difficult to obtain any positive employment references from them given that he was terminated for cause. He also argues that given the present economy he would have difficulty finding any employment.

Apart from its direct questioning of Coates, GTW has provided no evidence that "comparable jobs were available." Simply noting that Class I railroads exist in Michigan, that job search websites exist, and that newspapers contain jobs listings is not tantamount, or even approaching, the provision of evidence that comparable jobs are available. Assuming, *arguendo*, that GTW has shown that Coates has failed "to make reasonable efforts to find substantially equivalent or otherwise suitable employment," GTW would still fall short of showing that Coates has failed to mitigate backpay damages. It must affirmatively show, in addition, that comparable jobs were available in order to satisfy its burden. *Douglas*, ARB Nos. 08-070, 08-074, slip op. at 20; *Hobby*, ARB Nos. 98-166, -169, slip op. at 50. As a result, GTW has not shown that Coates has failed to mitigate backpay damages. Coates is therefore entitled to backpay under FRSA to the extent that he is not made whole by means of any FLA award that may be forthcoming.

Coates' Wage and Tax Statement from GTW for 2009 indicates wages of $82,616.79 and deferred compensation of $6,438.68 for a total of $89,055,47. (CX 7). His Statement of Earnings from GTW dated July 16, 2010 indicate year-to-date earnings of $50,592.54.[18] (CX 7). Coates testified that his total 2009 compensation was $89,055.47. (TR 145). Coates testified that his total 2010 compensation was $96,000.00.[19] GTW did not offer contrary evidence suggesting different amounts, or evidence that Coates would not have earned similar amounts in the future. Averaging the two sums, I find that his estimated annual compensation is $92,527.74. An estimated weekly rate therefore totals $1,779.38. Coates was terminated September 16, 2011 and reinstated September 18, 2013. Coates therefore is entitled to backpay of 104 weeks and 2 days, or $185,563.91.[20] *See* 29 C.F.R. § 1982.109(d)(1). Coates is further entitled to prejudgment interest for the period beginning September 16, 2011 to the period ending the date of this Decision and Order, and postjudgment interest for the period beginning the date of this Decision and Order to the period ending the date payment is made. To the extent that Coates is awarded any sum pursuant to his RLA award, he is only entitled to the difference between the above described amount less any RLA award amount.

Emotional Distress

To recover compensatory damages for emotional distress and mental suffering, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm. *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047, slip op. at 7 (Aug. 31, 2011) (citing *Smith v. Lake City enters., Inc.*, ARB Nos. 09-033, 08-

[18] On the monthly basis of 7.5 (January 1 to July 16), this figure prorates to $80,948.06.

[19] GTW argues that this later statement is inadmissible because Coates' recollection of the $96,000 figure was improperly refreshed insofar as it lacked proper foundation. Resp't Post-Hr'g. Rep. Br. 16. Coates' attorney asked him to examine a document and then asked him if it refreshed his recollection as to what he earned in 2010. (TR 146). Coates responded "yes." (TR 146). His attorney proceeded to ask him how much he had earned. (TR 146). Coates responded "$96,000" upon which respondent objected to improper refreshment and recollection. Coates' attorney then asked him if he remembered what he earned, upon which Coates declared "yes" and stated "$96,000." (TR 146-47). I find that Coates' attorney improperly refreshed Coates' recollection because he did not first ask Coates if he remember what he had earned in 2010. However, I find the error harmless and admit the statement of his earnings. If Coates' attorney what have asked the questions in the sequentially correct order, Coates would have arrived at the $96,000 statement. Indeed, Coates could not remember his 2010 earnings when asked by employer's counsel some time later during the hearing. (TR 216).

[20] The $185,563.92 figure includes $185,055.52 for 104 weeks at a rate of $1,779.38 per week plus $508.40 for 2 days at a rate of $254.20 per day, that is, 1/7 of $1,779.38.

091, ALJ No. 2006-STA-032 (Sept. 24, 2010)) (affirming ALJ's award of $50,000 in compensatory damages for emotional distress). Compensatory damages for emotional distress may be awarded for violations of FRSA. 29 C.F.R. § 1982.109(d)(1); *Bailey v. Consolidated Rail Corp.*, ARB Nos. 13-030, -033, ALJ No. 2012-FRS-012, slip op. at 2-3 (Apr. 22, 2013). Reasonable emotional distress damages may be based "solely upon the employee's testimony." *Ferguson*, ARB No. 10-075, slip op. at 7-8. Nonetheless, a "key step in determining the amount of compensatory damages is a comparison with awards made in similar cases." *Hobby*, ARB Nos. 98-166, -169, slip op at 32.

Coates submits that he is entitled to $50,000 in other compensatory damages for the pain, suffering, and emotional toll taken upon him as a result of his termination. Compl. Post-Hr'g Br. 54. Coates testified that the termination impacted him "in every way." (TR 147). He further testified that he has been unemployed for two years, that his wife was required to return to work full-time, and that he and his family, which includes a child with special needs, lost their healthcare coverage. (TR 147-48). GTW notes that Coates never sought professional help for mental anguish, nor did he testify to "sleepless nights or marital distress." Resp't Post-Hr'g. Rep. Br. 16. GTW further notes that Coates was under significant stress unrelated to his termination, including the health issues of his child and financial issues involving payment of back taxes. While Coates experienced stress unrelated to his termination, he credibly testified that his termination caused him stress. As a result, Coates has established by a preponderance of the evidence entitlement to emotional distress damages. *Ferguson*, ARB No. 10-075, slip op. at 7.

His complaint is similar to *Youngermann v. United Parcel Serv., Inc.*, ARB No. 11-056, ALJ No. 2010-STA-047 (February 27, 2013). Like Coates, Youngermann engaged in protected activity and was subsequently terminated for insubordination and falsifying his timecard. *Id.*, slip op. at 3. However, his employer reinstated him two weeks thereafter. *Id.* The ALJ awarded $2,122.12 in backpay plus interest, $5,000 in other compensatory damages, and $100,000 in punitive damages. In *Bailey*, the complainant was terminated after filing thirty-five formal safety complaints and arguing with his supervisor. *Bailey v. Consolidated Rail Corp.*, ARB Nos. 13-030, -033, ALJ No. 2012-FRS-012, slip op. at 2 (Mar. 27, 2013). Like Coates, he had worked for the employer for approximately twelve years. *Id.* The ALJ ordered reinstatement two years following termination. *Id.* This period approximates the length of time following Coates' termination. Compensatory damages of $4,000 were awarded for emotional distress. *Bailey*, ARB Nos. 13-030, -033, slip op. at 2-3 (Apr. 22, 2013). Coates' complaint approximates the situations found in *Youngermann* and *Bailey*. As a result, I find that Coates has suffered emotional distress quantifiable as $4,500, the average of those distress awards.

Punitive Damages

Punitive damages may be awarded under FRSA where there has been a "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law . . . ." *Ferguson*, ARB No. 10-075, slip op. at 8-9 (quoting *Smith v. Wade*, 461 U.S. 30, 51 (1983)).[21]

[21] The Restatement (Second) of Torts § 908 (1979) describes a two-step analysis. "The threshold inquiry centers on the wrongdoer's state of mind: did the wrongdoer demonstrate reckless or callous indifference to the legally protected rights of others, and did the wrongdoer engage in conscious action in deliberate disregard of those rights? The 'state of mind' this is comprised both of intent and the resolve actually to take action to effect harm. If this state

The *Smith* court explained that purpose of punitive damages is to punish the defendant for outrageous conduct and to deter future violations. *Id.*, slip op. at 8. It further explained that "[t]he focus is on the character of the tortfeasor's conduct – i.e., whether it is of the sort that calls for deterrence and punishment over and above that produced by compensatory awards." *Id.*; *see White v. The Osage Tribal Council*, ARB No. 96-137, ALJ No. 95-SDW-1, slip op. at 8 (Aug. 8, 1997) (overturning ALJ award of $60,000 in punitive damages because Board fully expected future compliance).

An important factor to consider when weighing whether damages are necessary to deter future violations is whether the illegal conduct reflects a corporate policy. *Ferguson*, ARB No. 10-075, slip op. at 8-9. A corporate policy that reflects illegal conduct may justify a finding that punitive damages are necessary for deterrence. *See Bailey*, ARB Nos. 13-030, -033, slip op. at 4 (J. Corchado concurring) (noting the converse, that a "corporate policy" of trying to comply with whistleblower laws "may" justify denying punitive damages under an affirmative defense analysis). Similarly, the ARB has held that an employer may avoid liability for punitive damages "where it has made a 'good faith effort' to comply with anti-discrimination provisions." *Youngermann*, ARB No. 11-056, slip op. at 7 (applying the good faith effort standard to a claim arising under the Surface Transportation Assistance Act).

The amount of punitive damages is "inherently difficult to quantify." *Id.* slip op. at 8. Neither the FRSA nor the associated DOL regulations provide explicit guidance. Excessiveness is a concern where legislation or regulation has not set a limit. *Id.*, slip op. at 9 (citing *Cooper Indus. v. Leatherman Tool Grp.*, 532 U.S. 424, 433 (2001)). Because the FRSA has capped punitive damages at $250,000, excessiveness is of no concern here. *Id.*; § 20109 (e)(2). Comparable cases and awards may assist an ALJ's determination of amount. *Youngermann*, ARB No. 11-056, slip op. at 12 (affirming an assessment of $100,000 because it fell within the mid-range of comparable cases and awards).

Coates submits that the conduct of GTW, especially Golombeski, who "target[ed] and manufactur[ed] evidence[22] against Coates," necessitates punitive damages of $150,000 in order to deter future similar conduct. Compl. Post-Hr'g. Br. 55. Coates further submits that the fact that he was targeted, and not Bonner, is illustrative of a culture of intimidation and harassment for employees who blow the whistle on GTW. GTW submits that it should avoid punitive damages on the basis that it should avoid liability entirely. Resp't Post-Hr'g Br. 17. GTW further submits that it has promulgated a non-retaliation policy specifically directed at FRSA and trains its managers accordingly.[23] (EX SS). While Golombeski sent Tassin an exaggerated report and investigated Coates and not Bonner, I find that these actions do not rise to a reckless and callous disregard for Coates' rights. Nor does the record otherwise evidence callousness or recklessness with respect to Coates' rights by Tassin, Golombeski, or GTW generally. Instead, the record reflects consistent quarrelling between Golombeski and Coates, which escalated in

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of mind is present, the inquiry proceeds to whether an award is necessary for deterrence." *Johnson v. Old Dominion Sec.*, Nos. 1986-CAA-003, -004, -005, slip op. at 29 (Sec'y May 29, 1991).

[22] The manufacture of evidence specifically includes the Golombeski report which stated that Coates has an attitude towards his supervisors, even though Golombeski based that assessment on his own interaction with Coates and without input from other supervisors.

[23] Golombeski testified that he was trained on the policy annually. (TR 410-11).

response to protected activity by a preponderance of the evidence. The record further reflects a failure by GTW to clearly and convincingly demonstrate that the protected activity was inconsequential to its termination decision. Nothing here suggests callous or reckless disregard. Indeed, Coates only points to the exaggerated report and the manner in which the falsification investigation arose. Further, GTW's non-retaliation policy is affirmative evidence of a corporate policy of intended conformity with the rules set forth in FRSA and demonstrative of a good faith effort to comply thereto. Because I find that punitive damages are not warranted, I do not reach an analysis of the their magnitude.

VII. Conclusion

Coates has demonstrated by a preponderance of the evidence a prima facie case under FRSA, that is, he engaged in protected activity, GTW had knowledge of that protected activity, he experienced adverse action, and his engagement in protected activity contributed to his experience of adverse action. GTW has failed to demonstrate by clear and convincing evidence that it would have taken the adverse action despite Coates' engagement in protected activity. GTW is therefore liable pursuant to FRSA, and Coates is entitled to the remedy described above.

ORDER

As complainant has not recovered backpay pursuant to his contractual claim under the Railroad Labor Act,

IT IS ORDERED that GTW shall pay complainant $185,563.91 in backpay with prejudgment interest for the period beginning September 16, 2011 to the period ending the date of this Order, and postjudgment interest for the period beginning the date of this Order to the period ending the date payment is made. In addition, GTW shall pay complainant $4,500 in other compensatory damages. No punitive damages shall be paid.

IT IS FURTHER ORDERED that GTW shall pay to complainant all costs and expenses, including reasonable attorney fees incurred by him in connection with this proceeding. Counsel for complainant shall have 60 days from the date of this Order to submit a relevant petition. A service sheet showing that proper service has been made upon the respondent and complainant must accompany the petition. If respondent disagrees with any aspect of the petition, it shall first confer with complainant's counsel and make reasonable efforts to resolve such differences. If counsel for complainant wishes to change its petition following such conference, it must file an amended petition within 10 days from the date of the conference. If instead there remains

unresolved differences following the conference, counsel for respondent must file objections, accompanied by a statement explaining why it has not been able to agree with opposing counsel, within 30 days of the conference.

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

RICHARD A. MORGAN
Administrative Law Judge

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

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

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

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

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

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

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