



Issue Date: 20 March 2014

Case Number: 2013-FRS-00035

In the Matter of:

MICHAEL D. FRICKA,
Complainant

v.

NATIONAL RAILROAD PASSENGER CORPORATION,
Respondent

DECISION AND ORDER – DISMISSING COMPLAINT

This proceeding arises under the employee protection provisions of the Federal Railroad Safety Act, 49 U.S.C. § 20109 (“FRSA”), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53 (Aug. 3, 2007) and Section 419 of the Railroad Safety Improvement Act of 2008, Pub. L. No. 110-432 (Oct. 16, 2008), and the FRSA regulations issued under at 29 C.F.R. Part 1982.

I. PROCEDURAL BACKGROUND

Complainant Michael D. Fricka (“Complainant” or “Fricka”) filed a whistleblower complaint with the Occupational Safety and Health Administration (“OSHA”) on February 9, 2012 (“Complainant’s complaint”). Therein, Complainant alleged that Respondent National Railroad Passenger Corporation (“Respondent” or “Amtrak”) unlawfully disciplined him after he reported that he sustained a work-related injury in an accident incurred on his way from Chicago, Illinois to Minneapolis, Minnesota on May 31, 2011 at Respondent’s direction. Specifically, Complainant alleged that “Respondent failed to acknowledge, record, or provide medical coverage for an on-the-job injury, transferred [Complainant] to another work location without explanation, and issued [him] a poor evaluation in reprisal” OSHA Findings Letter (“OFL”) 1.

On January 28, 2013, OSHA issued its findings. OSHA found that Complainant engaged in protected activity on May 31, 2011 when he reported an on-the-job injury to Respondent. OFL 2. OSHA also found that Respondent knew of Complainant’s protected activity because Respondent’s management conducted a work-injury investigation. *Ibid.*

OSHA however found that Complainant’s protected activity was not a contributing factor to the alleged adverse actions. *Ibid.* OSHA’s reasons in support were that Respondent did not

acknowledge that Complainant's injury was work-related, Complainant agreed to switch his work location, and although Complainant did receive a poor performance review, he had received several other poor evaluations before that. *Id.* at 2-3.

On February 4, 2013, Complainant appealed OSHA's findings to the Office of Administrative Law Judges ("OALJ") for a *de novo* hearing. The case was duly docketed, and was subsequently set for a hearing before an Administrative Law Judge ("ALJ"). I presided over a formal hearing in this matter on August 26, 2013. Respondent filed his post-hearing brief ("RPHB") on November 13, 2013. Complainant filed a post-hearing brief on February 19, 2014 accompanied by a Motion for Leave to File Complainant's Closing Argument.¹

III. SUMMARY OF THE EVIDENCE

A. WITNESS TESTIMONY

Michael Fricka

Fricka is currently a general foreman in the mechanical department of Amtrak. Hearing Transcript ("Tr.") 15. He has worked at Amtrak for 23 years. *Ibid.* He has been a general foreman since 2000. *Ibid.* He testified that over the course of his tenure at Amtrak, he has received several letters thanking him for his performance, and he has never been disciplined. *Ibid.*

Fricka currently works in Amtrak's Brighton Park facility in Chicago. *Id.* at 16. He has worked at that facility for about a year and a half. *Ibid.* Before that, he worked at Amtrak's 14th Street Station in Chicago. *Ibid.* At the 14th Street Station, he made sure to uphold the rules and regulations governing the mechanical department. *Id.* at 17. He also was a charging officer – meaning he acted as a type of "prosecuting attorney" to enforce company rules regarding disciplinary violations. *Ibid.* Fricka was assigned to the 14th Street Station on May 31, 2011 – the date he was injured. *Id.* at 16.

On May 30, 2011, Fricka was instructed to travel to Minneapolis from Chicago to do some work for Amtrak. *Ibid.* At the time, there was severe flooding beyond Minneapolis, and one of the trains was not able to go past Minneapolis. *Ibid.* Therefore, "the train had to turn at

¹ I advised the parties at the August 26, 2013 hearing that post-hearing briefs were due within 45 days after they received a copy of the hearing transcript in this case. Tr. 131. However, Complainant's attorney did not file a brief within the 45-day timeframe, and ultimately filed his brief six months following the hearing only after several inquiries to his office from my staff concerning whether he intended to file a written closing argument. The reasons given in his Motion for Leave to File Complainant's Closing Statement include claims that he was involved in extensive research and drafting pleadings in two unidentified cases in Illinois Circuit Court, two appellate briefs in unidentified cases before the Illinois Appellate Court, and preparing for an arbitration hearing in another unidentified matter. No explanation whatsoever is given as to why those matters should take precedence over this proceeding, nor is there any justification given for why it took counsel approximately six months for him to prepare and file his eight-page brief in this case. Despite these shortcomings, however, I am reluctant to punish Complainant for his counsel's lack of diligence, and I will therefore grant his motion and consider the arguments proffered in Complainant's brief.

Minneapolis, it had to be cleaned, had to be inspected so you're in compliance with the federal laws, had to have brake tests, engine departure tests." *Id.* at 16-17.

On May 31, 2011, Fricka was injured while riding his motorcycle from Chicago to Minneapolis. *Id.* at 17. He broke seven ribs and an index finger. *Id.* He was black and blue from his left temple all the way down to the back of his head. *Id.* at 17-18. He injured five discs in his spine. *Id.* at 18. He had to have surgery on his left shoulder. *Ibid.* He had road rash and will have to have his left knee replaced. *Ibid.* Fricka was in the hospital for five days, and then had to be taken care of by his parents after he was released. *Ibid.* In all, he missed 95 days of work as a result of his accident. *Ibid.*

Fricka testified that he reported the accident to Respondent as a work-related injury. *Id.* at 19. After he was released from the hospital, he went to a Kaiser clinic for a cast for his finger. *Ibid.* The Kaiser employee checked his benefits and told him he had to go through the claims department at Amtrak for authorization. *Ibid.* The Kaiser employee subsequently called Amtrak, and Amtrak said that this was not an on-the-job injury, that it was a personal illness, and that they would not cover the claim. *Ibid.*

Within a week of returning to work, Fricka was called into a meeting with Robert Herdegen, master mechanic; Morel Savoy, acting deputy master mechanic; Edward Witham, superintendent; and Robert Clarke, maintenance manager. *Id.* at 19-20. Herdegen said that he wanted "to try to find out what happened in the accident." *Id.* at 20. Fricka stated that he was having a hard time remembering things when he was questioned because of the "strike on my head." *Id.* at 20-21. Savoy said to Fricka that "maybe we'll send you for a fitness for duty physical." *Id.* at 21. Fricka then looked at Savoy and said, "this is over. I says [*sic*], you can send me any place you want. I said, I just passed a physical, and I walked out" *Ibid.* Fricka took Savoy's comment to be a threat, and he felt that the other people in the meeting were going to try to fire him. *Ibid.*

After he left the meeting, he was called back in the room. *Ibid.* When he returned, Herdegen asked Fricka who had authorized him to use his motorcycle. *Ibid.* Fricka replied, "You did." When Herdegen responded "No, I didn't," Fricka turned to Clarke and said, "You and I just talked about this out in the hallway [before the meeting] . . . would you please tell him exactly what you told me?" Clarke turned red and did not reply. Savoy asked everyone to move on. *Id.* 21-22.

According to Fricka, he met with Clarke before the meeting, and "Mr. Clarke said he remembered talking to Mr. Herdegen, that Herdegen never told me I could not take my motorcycle, just said that I would not be reimbursed mileage." *Id.* at 22.

Fricka testified that he eventually ended the meeting by walking out before it was finished. *Ibid.* He said it started to feel threatening, he did not want to do anything wrong, and he did not want to lose his job so he left. *Ibid.*

Fricka testified that he had a mid-year review before his accident (although he testified that he was unaware they even did a mid-year review until a long time after his accident). *Id.* 22-

23. That review covered the timeframe of October 1, 2010 to March 31, 2011. *Id.* at 23. Fricka also had a yearly performance review covering the timeframe of October 1, 2010 to September 30, 2011 which encompassed the time of his injury and subsequent recovery. *Ibid.* He had returned to work on September 5, 2011, *i.e.*, a period of only about three weeks before the annual review period closed. *Id.* at 24.

Fricka believed that he received an overall rating of 2.14 on his mid-year review, and 1.43 on his annual review – “which is absolutely the worst score I’ve ever heard.” *Id.* at 24-25. Fricka did not understand what he would have done in the three weeks before the close of the annual review period to warrant his score being lowered so dramatically. *Ibid.* Fricka believed that he was able to perform his job just as well after he returned to work as he was before being injured. *Id.* at 26. He conceded that his time off of work, however, was not a factor that Amtrak takes into account in a performance review. *Id.* at 25.

In response to his annual review, Fricka talked with Herdegen, Witham, and the vice-president of personnel. *Id.* at 25. When he talked with Witham, Witham told him that he had “integrity issues.” *Id.* at 27. Fricka did not know what he meant by “integrity issues,” as his integrity had never been questioned before. *Ibid.*

Fricka testified that his low annual performance review cost him a \$2,000 bonus. *Id.* at 28. In order for him to have received the bonus, according to Fricka, he would have needed at least the same rating as he had at the mid-year. *Ibid.* Fricka testified he had never missed a bonus before on account of an annual performance review. *Ibid.*

Fricka testified he also had an initial performance review done in 2012 by Richard LeBeck. *Id.* at 29. He testified that the range of review scores changed during 2012 from a scale of 1 through 4 at the beginning of the year to a range of 1 to 3 by the end of the year. *Id.* at 30. LeBeck originally rated Fricka “3’s and 4’s,” but after LeBeck submitted it to Witham for review, Witham rejected it. *Ibid.* Fricka testified “Mr. Witham rejected the 4, then it went back to Mr. LeBeck, went back to Mr. Witham. It was rejected again. Now it was turned back to a 2, returned to Mr. Witham for approval, and it was approved.” *Ibid.* According to Fricka, this lowered score resulted in Fricka not receiving a bonus that year of \$2,500. *Id.* at 30-31. He testified that was the second time he had been denied a bonus because of a lowered review. *Id.* at 31.

Fricka testified that he protested his 2012 review. *Id.* at 31. He filled out a protest form and gave it to his department head. *Ibid.* He was supposed to receive a response in writing within 30 days, but he never received one. *Ibid.* Fricka said he also tried to call the dispute resolution office, but it no longer existed. *Ibid.* He then wrote a letter to the vice president of personnel. *Id.* at 31-32.

Fricka subsequently spoke to Witham and followed up with a letter about his 2012 review. *Id.* at 32. According to Fricka, Witham stated in a letter back to Fricka that, although Fricka exceeded expectations in pretty much everything in the review, Fricka “could have done this, this, this, or this. However, those were not stipulations in the determination of your

evaluation.” *Ibid.* Fricka testified that Witham’s letter further stated that only those who received an overall rating of “3” received a \$2,500 bonus. Tr. 34.

Amtrak never paid his medical bills resulting from his motorcycle accident in 2011. *Id.* at 35; *see also* CX 2. He has submitted these bills to his insurance provider, but there are “a number that are still outstanding, and co-pays and whatnot that have just not been paid.” Tr. 36. Fricka believed that Amtrak would pay the medical bills if someone was hurt while on-the-job. *Ibid.* Fricka is concerned that by not paying these outstanding medical bills, doctors could get a lien against him, and that these bills could possibly hurt his credit rating. *Ibid.* He stated that these bills hurt his credit score when he went to purchase a new car. *Id.* at 37.

Sometime after returning from the accident, Fricka was transferred from the 14th Street Station to Brighton Park. *Ibid.* Fricka testified that during a party for a co-worker who was celebrating her 35th year with Amtrak, Witham interrupted the party and told everyone to “say goodbye to Mr. Fricka; he’s out of here effective Monday.” *Ibid.* According to Fricka, “That was my notification.” *Ibid.* Fricka acknowledged that he had previously been asked several times if he would go to Brighton Park or Chicago Union Station and had responded “whatever you guys tell me to do, that’s what I’m going to do” *Id.* at 37-38.

Fricka testified that he was not given a company-issued cell phone until August 2013. *Id.* at 38. He was given a 24-hour general foreman’s phone, which rang all the time because it received calls all day and all night from all over the country. *Ibid.* He returned it to Herdegen because it was driving him crazy. *Ibid.* Herdegen’s secretary said she could not issue him his own cell phone at the time because Amtrak’s budget was being cut. *Ibid.* However, other people in the company had received cell phones. *Id.* at 39. He testified that he had to use his personal cell phone for emergency calls in the meantime. *Ibid.*

On cross examination, Fricka admitted that Herdegen did not know Fricka had not been issued a company cell phone, and when he learned about it at his deposition, Herdegen immediately ordered someone to give Fricka a cell phone. *Id.* at 40.

Regarding Fricka’s 2011 review, under “Success Factors,” Fricka went from 2.44 (competent) at mid-year to 1.96 (competent) at the end of the year. *Id.* at 45. His score was still considered competent at the end of the year. *Ibid.* Under “Performance Goals,” he went from 1.89 (competent) at mid-year to 1.08 (needs development). *Ibid.* Fricka’s overall rating dropped from 2.11 (competent) at mid-year to 1.43 (needs development) by the year’s end. *Id.* at 46.

Fricka testified that he never had a discussion with Cecil Wingo, Amtrak’s claims director, as to how to go about getting his medical expenses paid by Amtrak. *Id.* at 49. Fricka stated that Wingo “refused to talk to me.” *Ibid.* However, Wingo did tell Fricka that it was Amtrak’s position that his injury was not going to be considered an on-the-job injury, but rather it would be treated as a personal illness. *Id.* at 51. Wingo, according to Fricka, would not say anything else because of attorney-client privilege. *Ibid.*

Fricka stated that no one at Amtrak ever told him to report his motorcycle accident to Aetna, his medical insurance company, as a non-work-related injury. *Id.* at 50. Fricka called

MCMC about having his medical bills processed as a FELA claim. *Ibid.* According to Fricka, someone told him “to call personnel, which I did. Talked to a gentleman in Washington. I don’t recall his name though.” *Ibid.* He testified he was given a number and address for MCMC and passed this information on to his surgeon, Dr. Karnezis, so that he could start sending the medical bills to MCMC for payment. *Ibid.*

Regarding the first meeting after his return to work from the injury, Fricka admitted that no one “directly” threatened his job. *Id.* at 53. Fricka stated that he felt threatened, however, when they told him they were going to send him for a fitness-for-duty physical. *Ibid.* He said he was not aware of employees being given fitness-for-duty physicals if they were demonstrating signs that they were lacking memory, or otherwise had some sort of injury that could impact their job. *Ibid.* Fricka did not believe it would make sense for him to have such a physical because he had passed one several days before returning to work. *Id.* at 54. Fricka clarified that the reason he was having a hard time remembering things during the meeting with Herdegen and the others was because “[s]o much information was disseminated so quickly and I got four people bombarding me at once.” *Ibid.*

Edward Witham

Edward Witham is currently mechanical superintendent in charge of the car department at Amtrak’s 14th Street CUS Station in Chicago. *Id.* at 60. He has been a master mechanic at Amtrak for three years, and has held the same title and responsibilities since May 2011. *Ibid.*

Witham learned that Fricka, who was under his supervision at the time, was involved in a motorcycle accident on May 31, 2011. *Id.* at 31. He learned shortly after the accident that there was a question whether Fricka’s accident was “work-related.” *Id.* at 61-62. He also participated in the meeting, which he described as a “get together,” with Fricka, Savoy, Clarke, and Herdegen regarding the accident shortly after Fricka’s return to work. *Id.* at 62-63.

Witham testified that he did not remember Herdegen saying to Fricka “that he was not aware Fricka was going to drive his motorcycle to Minnesota.” *Id.* at 62. He also did not remember Fricka saying “Bob, you just admitted to me out in the hall before the meeting that you told Herdegen about this.” *Id.* at 62-63. Witham further testified he did not remember Fricka “becoming upset and walking out of the room, or attempting to walk out of the room,” nor did he remember anyone saying that they might send Fricka for a fitness-for-duty physical. *Id.* at 63-64.

Witham testified about Fricka’s 2011 mid-year performance review, which included the review dates of October 1, 2010 to March 31, 2011 – the time immediately prior to Fricka’s accident. *Id.* at 64. According to Witham, Fricka received an overall score of “2.11 – competent.” *Id.* at 65.

Witham was the reviewing official for Fricka’s 2011 annual review, which covered the dates of October 1, 2010 to September 30, 2011. *Ibid.* Witham rated Fricka as “1.43 – needs development.” *Ibid.*; JX 9. He acknowledged that Fricka’s overall rating dropped from the mid-

year rating of 2.11 to 1.43 at the end of the year even though he was back to work for only about two or three weeks following his injury. *Id.* at 66.

Witham testified he was not the reviewing official for Fricka's 2012 mid-year review. *Ibid.* LeBeck, Witham's assistant superintendent, did Fricka's 2012 mid-year review, but Witham reviewed it. *Ibid.* Witham testified he rejected LeBeck's original review because it was "too high." *Ibid.* LeBeck had to resubmit the review with a lower score, and Witham accepted it. *Ibid.*

Witham testified that there was no performance bonus offered for the 2010 or 2011 annual review periods and that 2012 was the first time a performance bonus was offered. *Id.* at 67. Employees were eligible for a \$2,500 bonus if they scored a "3" on their review. *Ibid.* Fricka was not eligible for a bonus for the 2011 annual review period, irrespective of his rating. *Id.* at 68.

According to Witham, in 2010, Fricka threw "a lot of verbiage, a lot of words, at a situation. There's also an inconsistency, at the time, from his statements and the actual facts." *Id.* at 68. Witham testified that since the 2011 annual review, Fricka has "gotten quite a bit better." *Id.* at 69.

Witham testified that performance evaluations are not based on the number of injuries that are reported by employees. *Id.* at 69. He also stated he did not have anything against Fricka, and pointed out that Fricka had an injury before May 2011 which was not held against him in his review that year. *Id.* at 69, 72.

Witham testified he did not believe Fricka had any evaluations prior to 2012 that were "exemplary." *Id.* at 69. He also testified about the point scale used for Amtrak's mid-year and annual reviews. *See id.* at 69-70, 77-78, 80-81. According to Witham, the 2011 mid-year review and annual review were based on a scale of 1 (needs development) to 4 (exceptional). *Ibid.*; *see* JX 5 (mid-year review) and JX 9 (annual review). In 2012, the range was based on a three-point scale. *Tr.* 81; *see* RX 7 (annual review).

Witham explained that the reason he gave Fricka a lower score for his 2011 annual review than his 2011 mid-year review was because of Fricka's "integrity." He testified: "I hadn't noticed any real change in that. There still seems to be a lot of adding additional words, and like I said, just a general lack of truthfulness where the lie didn't matter either way anyways, if that makes sense." *Ibid.*

Witham described as one example of Fricka's "integrity" problem an incident where he sent Fricka a form via email three to five times to fill out for a joint inspection with the mechanical department. *Id.* at 71. According to Witham, Fricka told him each time that he never received the form. *Ibid.* "Each time, he didn't get it. It was a new conversation. So he said his email was messed up or he had this problem or that problem." *Ibid.* Witham subsequently had to give Fricka a hard copy of the form.

Witham further testified that he went with Fricka on another occasion to inspect a bunk on a train after they received a work order stating that it was defective. *Id.* at 71. Fricka told Witham that Dave Bataglia had told him it was broken. *Id.* at 72. According to Witham, he tested the bunk several times and determined it was not broken and then Bataglia came into the room and said that they were in the wrong railway car. *Ibid.* Witham remarked, “but the time wasted with that discussion about whether or not that bunk – you know, and just different things like that. I need to know when I ask you a question that the answer you’re giving me is accurate and at that time.” *Ibid.*

Witham testified that he and his subordinate managers have attended Amtrak’s Federal Rail Safety Act training program. *Id.* at 72-73. He stated that they were told during the program that no one should ever retaliate against an employee who reports an injury. *Id.* at 73. He also said that they were instructed on how to avoid even an appearance of retaliation for reporting an injury. *Ibid.* Witham further testified that Amtrak can fire managers for violating the FRSA, and stated that Amtrak does not use injury ratios as a performance metric – that is, an employee’s bonus is not tied to how many injuries he or she reports. *Ibid.*

Witham’s impression of Fricka is that he is “argumentative” and testified: “I have an issue with not getting the truth and then having more and more words thrown at a subject until you’re either (A) tired of the subject matter and you give in, or – you know, that’s my issue with Mr. Fricka.” *Id.* at 75. He “guess[ed]” that he may view it as an “integrity issue” if Fricka tried to report an injury as an on-the-job injury if Witham did not think it was an on-the-job injury. *Ibid.* Witham acknowledged that it would appear to be improper if a reviewing official was involved in determining whether an injury was work-related if: an employee had a 2.11 score for a mid-year review; that employee was then involved in an accident; Amtrak subsequently contested the injury reported by the employee as work-related; and the employee thereafter received a 1.43 on the final review even though he or she was out for three months during the relevant period of the rating period. *Id.* at 78. Witham testified, however, that it did not matter to him whether Fricka’s injury was work-related, and he insisted that he did not have any decision-making authority regarding whether Fricka’s injury was work-related or not – he just received the facts and submitted a report. *Id.* at 76-77. Moreover, according to Witham, Fricka’s injury was not an issue in his final evaluation. *Id.* at 79.

Robert Charles Herdegen

Robert Herdegen has been a master mechanic at Amtrak since 2007. *Id.* at 86. He supervised Fricka at the 14th Street facility in Chicago, and testified that he “thought well” of Fricka and, although he heard rumors regarding Fricka’s “integrity issues,” he did not personally have any such issues with Fricka. *Id.* at 86-87. Herdegen testified he never questioned whether Fricka’s May 31, 2011 accident was work-related. *Id.* at 87.

According to Herdegen, he was not aware of any “Amtrak-wide decree at some point in time indicating that employee performance reviews were too high and everybody should be knocked down.” *Id.* at 87. He further testified that “it never took place.” *Id.* at 87-88.

Herdegen testified that he remembered a meeting held shortly after Fricka returned to work in September 2011 in which he, Witham, Clarke, Fricka and another person were present. *Id.* at 88. He did not remember that anyone suggested during the meeting that Fricka might need a return-to-duty exam, but he did remember that “there was some sort of a reason Mr. Fricka became upset.” *Ibid.* Herdegen agreed that employee reviews are not supposed to take into account whether the employee has not been to work because he or she is injured, but are instead supposed to be based solely on what the employee did at work. *Ibid.*

Herdegen testified that he did not personally know of any reason why Fricka’s 2011 annual review dropped to 1.43 from his 2011 mid-year review score of 2.11. *Id.* at 89. He testified that the Chicago mechanical department scored a “competent” rating overall (a score of 2) in 2012. *Id.* at 90. In 2011, he said, the Chicago mechanical department scored “near a 2.” *Ibid.* There were about 40 employees under him, and, according to Herdegen, no one in his department got above a 2 overall rating that year. *Id.* at 89-90.

Herdegen described Fricka’s job performance from 2010 to 2012, testifying that in the first part of 2010 and 2011, Fricka “didn’t always meet expectations.” *Id.* at 91. According to Herdegen, since the fall of 2011, after Fricka was moved from the 14th Street Station to the Brighton Park facility in exchange for another employee, his performance improved as reflected in Fricka’s subsequent evaluations. *Ibid.* He believed that Fricka never had an above-average overall evaluation score prior to 2012. *Id.* at 92. Herdegen testified that Fricka should not have any reason to fear that he is going to lose his job, and he did not believe he had given Fricka any reason to think that he might lose his job. *Ibid.*

Herdegen did not recall when Amtrak first implemented bonuses, or even that Amtrak employees received bonuses in 2011 or 2012. *Id.* at 93. He testified that all employees under him in the Chicago mechanical department received a 2011 annual review score of 2 or lower. *Ibid.* According to Herdegen, two employees, Mike Fricka and Charles Belander, were originally rated above a 2 for that year, but their scores were subsequently re-evaluated and lowered. *Ibid.* Herdegen said the reason for the lowered evaluations was that he “did not feel they’ve exceeded their goals, as indicated for a rating of 3. That was my concern.” *Ibid.* The 2011 annual evaluations were reviewed by Witham and Herdegen, and Herdegen subsequently asked LeBeck to explain the reason why both employees should get a 3 (“exceeding goals”). *Ibid.* LeBeck was not able to justify the higher ratings, and both ratings were therefore lowered. *Ibid.* Herdegen testified that Belander, unlike Fricka, had not reported any injuries during that rating period.

According to Herdegen, Amtrak has a FRSA compliance and training program, and he and all of his subordinate managers have attended it. *Id.* at 94. He testified that Amtrak does not use injury ratios as a performance metric, and they can be fired for violating the FRSA. *Ibid.* He stated that it made no difference to him whether an employee’s injury was reportable or not and that he could not think of any motivation for a manager to take an unfavorable personnel action against an employee for reporting a work-related injury. *Id.* at 95. Herdegen acknowledged that Belander, whose evaluation had been lowered in 2011, was suspended “at some point,” but he was unsure of whether it was around the time of the 2011 performance review. *Id.* at 96; *see also* RX 5 at 219.

With regard to the events surrounding Fricka's motorcycle accident, Herdegen testified he remembered having a conversation with Fricka at about 7:19 a.m. on May 31, 2011. *Id.* at 118-19. Herdegen said he told Fricka that he was not approving Fricka's use of his motorcycle and told him "we had other means of transportation, train, company vehicle, such as that." *Ibid.* He testified he also told Fricka that Amtrak would not reimburse his mileage if he took his own vehicle to Minneapolis. *Id.* at 119. According to Herdegen, Fricka could have taken the next train out of Chicago to Minneapolis at 2:15 p.m. which was about six or seven hours after he was notified of his assignment. *Ibid.*

Robert Charles Clarke

Robert Clarke has been an equipment manager and planner for Amtrak since 2008, and has worked there since 2007. *Id.* at 98. Clarke has worked with Fricka the entire time he has worked at Amtrak and thinks that Fricka has always been a good, conscientious employee. *Ibid.*

On May 30, 2011, at 2:35 p.m., Clarke sent an email to Gary Knight, who was in Minneapolis, and copied Fricka, Herdegen, and David Hafner, acting deputy master mechanic. *Id.* at 99-100; *see* CX 1 at 1. In that email, Clarke wrote: "I wanted to know if you want to help Mr. Fricka get the train out? I have cleared this with Dave and Bob [Herdegen]. Please let me know if this is ok with you." *Ibid.*

Clarke testified about the meeting held shortly after Fricka's return to work attended by Clarke, Fricka, Herdegen, Witham, and Moe Savoy. *Id.* at 101. He said he did not remember Fricka becoming upset and raising his voice, but he thinks Fricka "was asking if he needed an attorney for the meeting." *Ibid.* Clarke did not remember a conversation with Fricka in the hallway before the meeting during which Fricka reminded him that Herdegen had known in advance that he was going to ride his motorcycle to Minneapolis. *Ibid.* He also did not remember Fricka looking at him and saying: "Bob, you just confirmed that to me outside in the hall." *Ibid.*

Clarke did not have anything to do with Fricka's performance evaluations. *Id.* at 102. According to Clarke, he gave Fricka the assignment to go to Minneapolis to do track work. *Id.* at 105. Clarke directed Fricka to take the train to Minneapolis because it was company policy and it would help him meet his "quarterly rides" requirement. *Ibid.* When asked why Fricka did not take the train, Clarke said, "I don't know why. Someone must have gave him permission or he took his vehicle." *Ibid.* He reiterated that he did not give Fricka permission to use his motorcycle, and he told Fricka that permission must come from Herdegen. *Id.* at 105-06, 109. According to Clarke, Fricka is not in jeopardy of losing his job as a result of reporting his injury. *Id.* at 106.

Clarke has attended Amtrak's FRSA compliance training, and testified he has no incentive for retaliating against an employee for reporting an injury. *Id.* at 106-07. He also testified that Amtrak has a written policy that requires employees to take the train when they are traveling on company business. *Id.* at 108. Amtrak's policy states:

Travel by rail is the Corporation's policy. However, the most cost-effective mode of transportation should be selected, using the most expeditious and economical routing. Travel by any mode of transportation other than rail, when rail is available, is an exception which must be authorized in advance. Stopovers or changes in routing may be authorized for personal convenience, but additional costs will be at the traveler's expense.

Id. at 109; JX 1 at 3.

Sherri Cook

Sherri Cook is manager of safety reporting at Amtrak and has held that position for about 10 years. *Id.* at 113. Her duties include keeping track of all accidents involving Amtrak and reporting them to the Federal Railroad Administration. *Ibid.* She is familiar with Amtrak's business travel policy, and stated that rail travel is the preferred method of travel unless something else is authorized. *Ibid.*

Cook testified she is familiar with the FRA guidelines on reporting injuries. *Id.* at 113. She said the policy prohibits an employee from using an unauthorized mode of transport. *Id.* at 113-14. According to Cook, the FRA guidelines have different classes of injuries: Class A injuries and Class B injuries. *Id.* at 114. Class A injuries are for workers injured while on-duty. *Ibid.* Class B injuries are for workers injured while not on-duty. *Ibid.* While both classes are reported to the FRA, she testified, not all reported injuries are considered work-related. *Ibid.*

Cook testified she was familiar with Fricka's injury. *Id.* at 114-15. She reported the injury to the FRA as "claimed, but not admitted." *Id.* at 115. That means that even though Amtrak is reporting the injury, it did not agree with the fact that the injury needed to be reported. *Id.* at 115-16. She did not report the injury to the FRA until over a year after the accident occurred because "Fricka had gone against the corporation." *Id.* at 116. She believed that "he had gone against what he was instructed to do by his supervisors. . . . From what I understand, his supervisor told him not to use his own personal mode of transportation to go to the site." *Id.* at 117. According to Cook, "per the FRA regulations, if you're not reimbursed or compensated for your mileage, then the incident is not work-related." *Ibid.*

Cecil Stanford Wingo

Cecil Wingo has worked at Amtrak for about 16 ½ years. *Id.* at 120. He is currently manager of claims/litigation, and has worked in that position since 2008. *Ibid.* As manager of claims/litigation, he supervises three to four field agents who handle a variety of claims against Amtrak. *Id.* at 121. His team investigates and handles property damage, crossing accidents, pedestrian accidents, and premises liability claims. *Ibid.*

Wingo testified that he has worked with Fricka "on and off" for the last 16 ½ years. *Id.* at 121. He had a conversation with Fricka regarding payment of Fricka's medical expenses. *Id.* at 121-22. He interviewed Fricka and told him that his injury was classified as an off-duty injury

and any payment of medical expenses would have to come through his private insurance carrier, Cigna. *Id.* at 122-24.

Wingo also testified about Amtrak's travel policy. He stated that company policy allows an employee to travel by company car or van if there are enough people going to that particular location. *Id.* at 124. It would not be outside Amtrak's policy for an employee to travel by company car, as opposed to a train, provided that it was approved by a supervisor. *Ibid.* Wingo believed this provision was under the company's travel policy at ¶ 6.1. *See* JX 1 at 3; Tr. 125.

In order to receive a travel authorization, according to Wingo, the employee or the employee's secretary, initiates a request for the authorization, and the employee's supervisor subsequently signs off on the authorization. *Ibid.* The request may go to an even higher level of authorization, depending on what the travel entails. *Ibid.* Wingo stated that, generally, a travel authorization is required prior to travel. *Ibid.* He was not sure whether a request for travel authorization was initiated before Fricka's trip to Minneapolis. *Ibid.*

B. DOCUMENTARY EVIDENCE

Joint Exhibits

The parties submitted the following 17 joint exhibits ("JX") which were admitted into evidence:

JX 1

JX 1 is Amtrak's "Travel Policy and Reimbursable Business Travel Expenses." JX 1 at 1. Relevant to this case is ¶ 6.0 which states:

Travel by rail is the Corporation's policy. However, the most cost-effective mode of transportation should be selected, using the most expeditious and economical routing. Travel by any mode of transportation other than rail, when rail is available, is an exception which must be authorized in advance. Stopovers or changes in routing may be authorized for personal convenience, but additional costs will be at the traveler's expense.

JX 1 at 8.

JX 2

JX 2 is an email sent on May 31, 2011 from Amtrak's eTrax office to Fricka regarding his travel from Chicago to Minneapolis/St. Paul. The notification email states: "8:35 AM Tuesday, May 31, 2011: Kathleen King – Turning trains in MSP due to flooding further West. Mike will take personal transportation from CHI to MSP. Hotel will be arranged by MSP Supt. Rick Johnson and direct billed."

JX 2 at 12.

JX 3

JX 3 is an excerpt of the FRA Guide for Preparing Accident/Incident Reports (“FRA Guide” or “FRA Guidelines”) published by the FRA, which is under the U.S. Department of Transportation (“DOT”). Relevant to this case, the report states:

Note: An employee in deadhead transportation is considered an “employee on duty” regardless of the mode of transportation. Deadhead transportation occurs when an employee is traveling at the direction or authorization of the carrier to or from an assignment, or the employee is involved with a means of conveyance furnished by the carrier or compensated by the carrier.

Exception: If an employee is housed by the carrier in a facility such as a motel, and part of the service provided by the motel is the transportation of the employee to and from the work site, any reportable injury to the employee during such transit is to be recorded as that of a Railroad Employee Not On Duty (Class B). Likewise, if the employee decides upon other means of transportation that is not authorized or provided, and for which he would not have been compensated by the railroad, the injury is not considered work-related.

JX 3 at 13.

JX 4

JX 4 is Fricka’s FY 2010 Performance Review report, covering the period October 1, 2009 to September 30, 2010. JX 4 at 14. The rating score range is from “1” to “4.” *Ibid.* A score of “1” means that the employee “Needs Development.” *Ibid.* A score of “2” means that the employee was “Competent.” *Ibid.* A score of “3” means that the employee was “Strong.” *Ibid.* A score of “4” means that the employee was “Exceptional.” *Ibid.*

Richard LeBeck, Mechanical Assistant Superintendent, signed Fricka’s review. *Ibid.* Fricka received a rating of “2.13 - Competent” under “Success Factors,” which was weighted at 40% of his overall rating for the year. *Ibid.* Fricka also received a rating of “2.5 – Competent” under “Performance Goals,” which was weighted at 60% of his overall rating for the year. *Ibid.* Fricka’s overall rating for FY 2010 was “2.35 - Competent.” *Ibid.*

JX 5

JX 5 is Fricka’s FY 2011 Mid-Year Performance Review report, covering the period October 1, 2010 to March 31, 2011. JX 5 at 30. The range for rating scores is the same as the FY 2010 Performance Review. *See* JX 4 at 14.

Fricka’s FY 2011 Mid-Year report was signed by Ed Witham. JX 5 at 30. Fricka received a rating of “2.44 - Competent” under “Success Factors,” which was weighted at 40% of his overall rating. *Ibid.* Fricka also received a rating of “1.89 – Competent” under “Performance Goals,” which was weighted at 60% of his overall rating. *Ibid.* Fricka’s overall rating for his FY

2011 Mid-Year Performance Review was “2.11 - Competent.” *Ibid.* Witham also included, among others, the following comment in the report:

You have the ability to motivate people and move trains. You apply this circumstantially. I would like to see this more consistently. When you apply yourself you are unstoppable.

Id. at 1.

JX 6

JX 6 is a January 29, 2010 Employee Advisory bulletin to all Amtrak employees from Joe Boardman (“Boardman”), President and CEO of Amtrak informing them that Amtrak management has decided that injury ratios will no longer be associated with safety goals. JX 6 at 47. According to the bulletin, Amtrak used to measure safety performance within each department by using, in part, the number of injuries reported. *Ibid.* However, by tying injury reports to safety performance, some felt that it created a culture where injury reports were punished, and Amtrak would no longer tie injury reports to safety performance. *Ibid.*

JX 7

JX 7 is a December 14, 2009 letter to all Amtrak employees from Boardman and Amtrak’s Executive Committee. JX 7 at 48-50. The letter describes several issues regarding the reporting of injuries. *Id.* at 48. According to the letter, “[a]ll injuries that occur during work and/or on Amtrak property must be reported. *Ibid.* The letter reiterated to all supervisors and managers that they were not to blame or punish employees who report injuries. *Ibid.* The letter also states that supervisors and managers should first ensure that employees receive appropriate treatment, and then determine how such injuries can be prevented. *Ibid.* Finally, the letter reminded everyone that Amtrak’s policy is to abide by the FRSA, which prohibits disqualifying or denying promotional opportunities to employees based on a prior work-related injury. *Ibid.*

JX 8

JX 8 is Amtrak’s policy “to achieve Accurate Reporting of Injuries and Illnesses and to ensure compliance with regulations of the [FRSA].” JX 8 at 51-54. The policy provides guidance to managers and supervisors regarding reporting employee on-duty injuries and illnesses, as well as non-employee injuries when individuals are injured on Amtrak property or on Amtrak equipment. *Id.* at 51.

Paragraph 5 of the policy notes that Amtrak will not tolerate harassing or intimidating conduct by any employee intended to discourage an individual from receiving proper care for an injury or for reporting an injury. *Id.* at 53. Paragraph 5 also states that any employee who engages in harassment will be disciplined, up to and including termination. *Ibid.* Finally, the policy states that employees will be provided whistleblower protection from any retaliatory action taken as a result of reporting any behavior that may violate the policy. *Id.* at 54.

JX 9

JX 9 is Fricka's FY 2011 Performance Review, covering the period October 1, 2010 to September 30, 2011. JX 9 at 55-65. Although the report does not state the rating score range, it appears the range is again from "1" to "4." *See id.* at 55-56, 58.

Ed Witham signed Fricka's FY 2011 Performance Review. Tr. 55. For FY 2011, Fricka received a rating of "1.96 – Competent" under "Success Factors," which was weighted at 40% of his overall rating for the year. *Ibid.* Fricka also received a rating of "1.08 – Needs Development" under "Performance Goals," which was weighted at 60% of his overall rating for the year. *Ibid.* Fricka's overall rating for FY 2011 was "1.43 – Needs Development." *Ibid.* Witham's overall comments on the report were that Fricka was "[v]ery capable General Foreman. Not consistent in job execution." *Ibid.*

JX 10

JX 10 is Fricka's Employee Injury/Illness Report. JX 10 at 66. Stephanie Hulet, General Foreman for Amtrak, completed the form for Fricka on May 31, 2011. *Ibid.* The report listed the date, time, and location of Fricka's injury. *Ibid.* Under the question, "What task does the injured person say he/she was performing when they became injured or ill?", Hulet wrote: "Driving to MSP to work." *Ibid.*

JX 11

JX 11 is a Medical Information and Consent form, authorizing Amtrak to obtain all health and medical information regarding Fricka's injury. JX 11 at 67.

JX 12

JX 12 is a travel approval request from eTrax to Fricka. JX 12 at 68. The approval form was sent on May 31, 2011, and notes the reason for Fricka's travel to Minneapolis/St. Paul, as well as authorizes expenses for food. *Ibid.* Under the comments section, Kathleen King wrote, "Turning trains in MSP due to flooding further West. Mike will take personal transportation from CHI to MSP. Hotel will be arranged by MSP Supt. Rick Johnson and direct billed." *Ibid.* The form also states that Fricka's supervisor, Ed Witham, had not yet approved his travel. *Ibid.*

JX 13

JX 13 is an email chain regarding the operation of Amtrak's train #7. JX 13 at 69. On May 30, 2011, David Haffner sent an email to several Amtrak employees, including Robert Clarke and Ed Witham saying, "Train #7 will be a stub train only to Minneapolis on 5/31 and June 1 due to weather conditions out west." *Ibid.* That same day, Robert Clarke responded to Haffner and copied Fricka saying, "Looks like for the next 3 days we will be sending out 3 coaches and 1 lounge car." *Ibid.*

JX 14

JX 14 is an email dated May 30, 2011 at 2:35 p.m. from Robert Clarke to Gary Knight, with Fricka, Robert Herdegen, and David Haffner copied. JX 14 at 70. Clarke asked Knight to help Fricka “get the train out.” *Ibid.* As Knight lived in Minneapolis, Clarke stated that he thought Knight would agree. *Ibid.* Clarke “cleared this with Dave [Haffner] and Bob [Herdegen].” *Ibid.*

JX 15

JX 15 is an email from Haffner to several Amtrak employees dated May 30, 2011 at 12:11 p.m. JX 15 at 71. The email simply states that train #7 “will be a stub train only to Minneapolis on 5/31 and June 1 due to the weather conditions out west.” *Ibid.*

JX 16

JX 16 is an email chain originating from Herdegen on May 31, 2011 at 6:26 a.m. JX 16 at 72. Herdegen wrote: “Stub train 7/8 Chicago to Minneapolis for the next couple days (5/31 & 6/1) account [*sic*] of the high water conditions out west (North Dakota).” *Ibid.* He then wrote that Bismarck, North Dakota had experienced severe flooding. *Ibid.*

JX 17

JX 17 is a copy of JX 2. *See* JX 17 at 73. It does not contain any additional evidence.

Complainant’s Exhibits

In addition to the joint exhibits submitted by the parties, Complainant submitted 2 exhibits (“CX”) that were admitted into evidence:

CX 1

CX 1 consists of copies of JX 12-16. It does not contain any additional evidence.

CX 2

CX 2 is a “Table of Known Treaters/Medical Bills” for Fricka. CX 2 at 1-2. The table reflects the description, date, and amount of medical charges Fricka incurred as a result of his accident. *Ibid.* The total amount of medical expenses incurred up to the point of the hearing was \$297,797.21.² *Id.* at 2.

² Complainant does not contend that all \$297,797.21 is outstanding. A portion of this amount has been paid by his private health insurer. However, he does not know how much is still unpaid. *See* RX 4 at 49.

Respondent's Exhibits

Respondent also submitted nine exhibits in addition to the parties' joint exhibits, of which Respondent's Exhibits ("RX") 4, 5, 6, and 7 were admitted into evidence without objection:

RX 4

RX 4 is a copy of Fricka's deposition. The deposition was taken on July 18, 2013 in Chicago, Illinois. RX 4. As Fricka testified at the hearing on August 26, 2013, I will summarize only those portions of his deposition testimony that were not covered at the hearing.

Fricka detailed the events that led to his May 31, 2011 accident. RX 4 at 10. He said that he rode his motorcycle to Minneapolis because there were no other vehicles available at the time. *Id.* at 11. Although a train was leaving from Chicago to Minneapolis, Fricka testified he did not have enough time to go home, pack his bags, grab his medication, and return to the terminal, so he talked to Robert Clark and said he would take his motorcycle. *Ibid.* Clark said, "Let's call Herdegen." *Ibid.* Herdegen then said, "I am not paying you for mileage. Call me when you get there, so I know you got there safe." *Ibid.* Herdegen reiterated that Fricka would be working with Gary Knight, who lives in Minneapolis but works in Chicago. *Ibid.*

Fricka was asked during the deposition about whether he obtained authorization to use his motorcycle:

Q: Did you obtain authorization prior to taking your motorcycle?

A: I was never told not to, so, yes, it was – a request was put in for payment for my travel as well, where on the request it also shows I was taking my personal vehicle.

Q: So you took not being told "no," as approval to take your motorcycle.

A: Correct

Id. at 13. When asked whether his travel request form was approved he said, "I was told to go. So in answer to your question, yes, I was told to go by my boss, Bob Clark." *Id.* at 14. "Mr. Herdegen was aware I was taking my motorcycle. Mr. Herdegen at no time ever told me not to. Mr. Clark never told me I could not. Mr. Herdegen, as a matter of fact, said, 'Please make sure you call me when you get there to make sure you got there safely.'" *Id.* at 14-15.

Complainant testified that his credit score has suffered as a result of Amtrak's failing to pay his medical bills. *Id.* at 49-50. He alleged that Dr. Karnezi has a lien against him for failing to pay some of his bills. *Ibid.*

Complainant is also seeking compensation for emotional pain and suffering, anguish, inconvenience, loss of normal life, embarrassment, and anxiety. *Id.* at 50. Fricka is not seeking psychiatric or therapeutic treatment. *Ibid.*

RX 5

RX5 is a copy of the deposition of Robert Herdegen. The deposition was taken on July 19, 2013 in Chicago, Illinois. RX 5 at 156.

During his deposition, Herdegen discussed in more depth the events surrounding Fricka's request to use his motorcycle. Herdegen testified that he was first aware that Fricka was going to drive his motorcycle to Minneapolis from Chicago on the morning of May 31, 2011 at around 7:00 a.m. *Id.* at 173. Upon entering his office, Herdegen's secretary, as she was filling out Fricka's travel authorization, asked Herdegen if he was aware that Fricka was taking his motorcycle. *Id.* at 174. Herdegen then attempted to call Fricka at 7:19 a.m. *Id.* at 177. Fricka did not answer but called back a few seconds later. *Ibid.* Herdegen did not know where Fricka was during the conversation, but he assumed that he was *en route* to Minneapolis. *Id.* at 180.

Herdegen testified: "I just validated with Mr. Fricka that I did not authorize him to take his motorcycle to Minneapolis, and he would be on his own. He wouldn't be compensated for that travel." *Id.* at 178, 179. Herdegen thought that Fricka "said he understood." *Id.* at 178. Herdegen said he may have told Fricka during this conversation to call him when he arrived in Minneapolis so that he knew Fricka arrived safely. *Id.* at 179.

Herdegen stated that he did not authorize Fricka to take his motorcycle because Amtrak had company vehicles for him to take, as well as a train. *Id.* at 208. Herdegen was sure that Amtrak had a pick-up truck available that day for him to take to Minneapolis. *Id.* at 208-09. He said it would be "almost impossible" for Amtrak not to have a vehicle available because it has four or five vehicles in Chicago for this purpose. *Id.* at 209.

After the conversation, Herdegen "didn't know for sure" whether Fricka was still going to take his motorcycle. *Id.* at 178. "I assumed Mike – I wasn't sure of his location, and I don't know if he was stopped at some place and gave me a call, or where he was in the process. I didn't know." *Id.* at 178-79.

Herdegen discussed his understanding of "deadheading" under the FRA. *Id.* at 187. He said that his understanding is if an employee has to travel for work, the employee "will deadhead usually in company transportation or via rail transportation preferred." *Ibid.* An employee may be allowed to use personal transportation if authorized. *Id.* at 188. His understanding about the rules for deadheading come from his years of experience on the railroad, including his time with another railroad company. *Ibid.*

On June 7, 2011, Herdegen sent a letter to Sherri Cook in which he requested that Fricka's injury be reclassified from an on-the-job injury to a personal off-the-job injury. *Id.* at 190. He sent the letter because he "wanted to make sure this was recorded properly." *Ibid.* He thinks, however, that Amtrak's medical department made the ultimate decision to treat Fricka's injury as off-the-job. *Ibid.*

Herdegen did not know what difference it would make to classify an employee's injury as on-the-job versus off-the-job. *Id.* at 191. He said that an on-the-job injury must be reported to

the FRA, but an off-the-job injury does not need to be reported (although he will still report it to Amtrak's own medical department). *Id.* at 192-93.

Herdegen testified that since 2009, injuries reported to the FRA do not count against Amtrak's safety record. *Id.* at 191. It is not an FRA policy, but an Amtrak policy. *Id.* at 192. More reported on-the-job injuries do not result in an investigation or fine. *Id.* at 193.

RX 6

RX 6 is the deposition transcript of Robert Clarke. The deposition was taken on July 18, 2011 at 2:10 p.m. in Chicago, Illinois. RX 6 at 245.

At his deposition, Clarke discussed in more depth the events surrounding Fricka's request to use his motorcycle. On May 30, 2011, Clarke called Fricka and told him "I want you to use the train and check off your quarterly safe ride." *Id.* at 270. This conversation occurred sometime after noon. *Id.* at 275. Fricka then told Clarke that he would like to use his own vehicle to go up there for a bike ride and leave from his house. *Id.* at 270. "I told Mr. Fricka I could not give him the authority. He would have to talk to Mr. Witham or Mr. Herdegen to get that information." *Ibid.* According to Clarke, Fricka stated either that he had talked to Herdegen or he would talk to Herdegen, and testified: "And as far as I knew, Mr. Fricka was going to leave from his house and head to Minnesota," but Clarke was unsure of whether Fricka would take his motorcycle.

Clarke directed Fricka to "get on the train" to go to Minneapolis. *Id.* at 270. Specifically, he told Fricka to take train #7, although it was not the same train that Fricka was to turn around. *Id.* at 274. The train that Fricka was to turn around was train #8, which would become train #7 on its way back to Chicago. *Ibid.* Clarke wanted Fricka to take the train to Minneapolis because it would be cost-effective for the company, it would allow Fricka to meet his quarterly train ride requirement, and if anything happened to the train, Fricka would be there to service it. *Ibid.*

Sometime during a conversation on May 31, 2011, Fricka told Clarke that he needed to go home and get his diabetes medication before he left for Chicago. *Id.* at 275-76. He did not recall when that conversation occurred, and he did not remember Fricka saying that he did not have enough time to grab the train to Chicago. *Id.* at 276. Clarke stated that he knew Fricka had at least a day to make preparations to take the train. *Id.* at 322.

According to Clarke, Fricka called him from his home on May 31, 2011 before he left.³ *Id.* at 277. Fricka told him that he would be taking his motorcycle. *Ibid.* Clarke told him that he could not authorize it, and that Witham or Herdegen would have to approve it. *Id.* at 278.

³ I note from Clarke's deposition that it is unclear whether this was actually the conversation that occurred on May 30, 2011, or whether this was a separate conversation that occurred on May 31, 2011. Clarke stated that he was not sure either as he thought there were several conversations during the three days leading up to Fricka's departure. *See id.* at 270, 277-78.

Clarke said he did not remember saying to Fricka that there were no company vehicles for him to drive to Minneapolis, but he said “there probably wasn’t” that day. *Id.* at 276. Clarke assumed that there was no available vehicle because he thought “it went up there a day ahead of time, because they needed to send parts and equipment up there.” *Ibid.* Clarke later conceded that he probably could not answer whether there were vehicles available because “we could have gotten one from 16th Street.” *Id.* at 277.

Clarke did not remember Herdegen saying that Amtrak would not pay for Fricka’s mileage if he took his motorcycle. *Id.* at 280. However, he thinks he remembers Fricka telling him that Herdegen said that. *Ibid.*

Clarke and Herdegen had a conversation before Fricka’s accident about sending Fricka to Minneapolis and how Fricka was to travel there. *Id.* at 283. Clarke approached Herdegen and asked him if he could use a general foreman or an equipment manager to turn the train around instead of a mechanical foreman. *Ibid.* He specifically asked Herdegen to use Fricka. *Ibid.* Herdegen agreed. *Id.* at 284. Then he approached Fricka and asked him if he would go to Minneapolis. *Id.* at 283.

Clarke talked with Herdegen about Fricka’s use of his motorcycle after the accident occurred. *Id.* at 285-86. Herdegen told Clarke that “he didn’t give him permission. He asked me if I gave him permission to ride his bike. And I said, ‘No,’ that he was to call you [or Witham].” *Id.* at 286.

According to Clarke, Witham and Savoy instructed him and Stephanie Hulet to take a van and visit Fricka in the hospital after the accident to fill out an accident/injury report on the night of May 31, 2011. *Id.* at 288, 295. They asked Fricka questions about the accident in his hospital room. *Id.* at 290-91.

RX 7

RX 7 is Fricka’s FY 2012 Performance Review, covering the period October 1, 2011 to September 30, 2012. RX 7. Richard LeBeck is the reviewing manager. *Ibid.* The review scale ranges from 1 to 3: 1 meant that the employee “Did Not Meet Goals;” 2 meant that the employee “Met Goals;” and 3 meant that the employee “Exceeded Goals.” *Ibid.* Fricka received an overall rating of “2 – Met Goals (2.0).” *Ibid.*

III. LAW

The FRSA’s whistleblower provision prohibits covered rail carriers from retaliating against an employee who engages in certain protected activities. 49 U.S.C. § 20109(a). In order to prevail, a complainant must prove by a preponderance of evidence that he or she (1) engaged in protected activity, (2) suffered an unfavorable personnel action, and (3) the protected activity was a “contributing factor” in the unfavorable personnel action. *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-9, at 4-5 (ARB Feb. 29, 2012) (applying AIR 21’s legal burdens of proof found at 49 U.S.C. § 42121(b)(2)(B)(iii)). Contributing factor means “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of

the decision.” *Id.* at 6; *see also Hutton v. Union Pac. R.R. Co.*, ARB No. 11-091, ALJ No. 2010-FRS-20, at 12 (ARB May 31, 2013). If the complainant meets his or her burden of proof, the employer may avoid liability if it can show by clear and convincing that it would have taken the same adverse action in the absence of the employee’s protected activity. *DeFrancesco*, ARB No. 10-114, at 5.

IV. DISCUSSION

A. Whether Complainant engaged in protected activity.

At the August 26, 2013 formal hearing held in this case, I was made aware for the first time that Amtrak had a written policy requiring employees to travel by rail or company car unless other transportation was authorized. Tr. 127. Inasmuch as I had not been informed of this policy prior to ruling on Respondent’s motion to dismiss, I allowed the parties to introduce evidence regarding the policy at the hearing, and informed them that I would reconsider my previous ruling in light of this new evidence.⁴ *Ibid.* After reviewing my previous Order, the hearing testimony, the evidence admitted at the hearing, and the parties’ final briefs, I continue to find that Complainant engaged in protected activity.

As noted above, the FRSA prohibits a covered railroad carrier from taking adverse action against a railroad employee who engages in protected activity. 49 U.S.C. § 20109. Prohibited activity covers, *inter alia*, an employee’s “lawful, good faith act done . . . to notify, or attempt to notify, the railroad carrier or Secretary of Transportation of a work-related personal injury or work-related illness of an employee” 49 U.S.C. § 20109(a)(4).

Congress inserted this provision in its amendments to the FRSA in Section 1521 of the 9/11 Commission Act of 2007 because it was concerned that employees would not report work-related injuries for fear of retaliation. *Santiago v. Metro-N. Commuter R.R.*, ALJ No. 2009-FRS-00011, at 16 (ALJ Sept. 14, 2010) (citing *Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America’s Railroads; Hearing Before the H. Comm. On Transportation and Infrastructure*, 110th Cong. 84 (2007)). The failure to report injuries, Congress concluded, undermined the FRA’s ability to correctly identify and address threats to the safety of the nation’s rail network. *Ibid.* Thus, the purpose of the provision was to encourage employees to report work-related injuries by providing them with whistleblower protection. *Ibid.*

Congress did not define “work-related injury” within the statute itself. *See* 49 U.S.C. §§ 20102, 20109. However, it empowered the U.S. Department of Transportation (“DOT”) to issue railroad safety regulations. 49 U.S.C. § 20103(a). DOT exercised that authority, and issued implementing regulations regarding, *inter alia*, reporting railroad accidents at 49 C.F.R. § 225. Among the regulations DOT issued is the definition of “work-related” which means:

⁴ Reconsideration of my previous decision is proper as my Order Denying Motion to Dismiss was an interlocutory order, which is subject to reconsideration at any time before a final decision is rendered in the matter. *See Fayette Investors v. Commercial Builders, Inc.*, 936 F.2d 1462, 1469 (4th Cir. 1991) (“An interlocutory order is subject to reconsideration at any time prior to the entry of a final judgment.”); *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 185 (5th Cir. 1990) (“[B]ecause the denial of a motion for summary judgment is an interlocutory order, the trial court is free to reconsider and reverse its decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive law.”).

. . . related to an event or exposure occurring within the work environment. An injury or illness is presumed work-related if an event or exposure occurring in the work environment is a discernible cause of the resulting condition or a discernable cause of a significant aggravation to a pre-existing injury or illness. . . .

49 C.F.R. § 225.5. The regulation defines “work environment” as meaning the:

. . . establishment and other locations where one or more railroad employees are working or present as a condition of their employment. The work environment includes not only physical locations, but also the equipment or materials processed or used by an employee during the course of his or her work, *and activities of a railroad employee associated with his or her work, whether on or off the railroad’s property.*

49 C.F.R. § 225.5 (emphasis added).

In my June 24, 2013 Order Denying Motion to Dismiss (“ODMD”), I found that Complainant was engaged in “deadhead transportation” as defined in relevant case law and the FRA Guide. ODMD 6-8. Specifically, I found that, although Fricka may not have been authorized to use his personal vehicle to travel to Minneapolis, Complainant was nonetheless “on-duty” at the time of his accident because he was traveling “at the direction” of Amtrak. *Id.* at 8 (quoting FRA Guide, Ch. 2 at 16). As the FRA Guide makes clear, an employee need only be travelling at the direction *or* authorization of Amtrak. *See FCC v. Pacifica Foundation*, 438 U. S. 726, 739-740 (1978) (canons of construction usually require terms connected by disjunctive “or” be given separate meanings). Since Fricka had been directed by Amtrak to travel to Minneapolis, I thus concluded that Complainant was deadheading and on-duty at the time of his May 31, 2011 motorcycle accident, and that his injuries were therefore “work-related.” *Ibid.*

Despite the fact that it has an internal policy requiring employees to obtain prior authorization before travelling by any means other than rail for work purposes, Amtrak clearly cannot overturn the provisions of the FRA Guide simply by promulgating its own written travel policies. As I determined in my June 24, 2013 Order, the FRA expressly identifies an employee travelling “at the direction” of the railroad as an “on-duty” employee, regardless of the mode of transportation. To the extent Amtrak’s policies diverge from the provisions of the FRA Guide, the FRA Guide controls. Thus, since Fricka was travelling to Minneapolis at the direction of Amtrak and was engaged in “deadhead transportation” as that term is defined in the FRA Guide, I find that Fricka engaged in protected activity when he reported the injuries he sustained during the accident on May 31, 2011 to Amtrak as “on-duty.”

B. Whether Complainant suffered an unfavorable personnel action.

Complainant's Arguments

Complainant argues that he was “subjected to several unfavorable personnel actions in retaliation for having reported the accident as work-related.” Complainant’s Closing Statement (“Comp. Cl.”) at 3. His closing argument focuses on only two unfavorable personnel actions, *i.e.*, “Amtrak refused to pay his medical bills and gave him two (2) consecutive unsatisfactory performance reviews.” *Ibid.* However, based on his prior complaint, other pleadings and the formal hearing, it also appears that Complainant is alleging that Amtrak took adverse action against him when he was transferred to Brighton Park. These three claims are therefore discussed below.

Respondent's Arguments

In its post-hearing brief, Respondent fails to address Fricka’s claim that a poor annual evaluation and his transfer constitute unfavorable personnel actions.⁵ Respondent does argue, however, that its failure to pay Fricka’s medical bills does not constitute adverse action. RPHB 17. According to Respondent: “Mr. Fricka cannot establish that Amtrak’s instruction to him to use private insurance instead of FELA insurance was a denial of medical treatment. He received medical treatment either way, it was just a matter of whether that treatment was paid out of an insurance pool dedicated to work-related or non-work-related injuries.”⁶ *Ibid.*

Applicable Law Regarding Unfavorable Personnel Action

An employer is forbidden under the FRSA from taking adverse action against an employee for engaging in protected activity. The statute defines an unfavorable personnel action as including discharging, demoting, suspending, reprimanding, “or in any other way discriminat[ing] against an employee” 49 U.S.C. § 20109(a). The FRSA regulations describe “discrimination” as “including but not limited to intimidating, threatening, restraining, coercing, blacklisting, or disciplining an employee if such discrimination is due” to the employee’s protected activity. 29 C.F.R. § 1982.102(b)(1). Similarly, the Administrative Review Board (“ARB”) has determined that adverse action includes any “activity that would dissuade a reasonable employee from engaging in protected activity.” *Menendez v. Halliburton, Inc.*, ARB No. 09-002 and 09-003, ALJ No. 2007-SOX-5, at 20 (ARB Sept. 13, 2011); *see also id.* at 15 (adopting the adverse action standard for DOL whistleblower cases from its decision in *Williams v. American Airlines*, ARB No. 09-018, ALJ No. 2007-AIR-4 (ARB Dec. 29, 2010)) and *Hamilton v. CSX Transp., Inc.*, ALJ No. 2010-FRS-25, at 21 (ALJ Nov. 17, 2011) *aff’d* ARB No. 12-022 (ARB Apr. 30, 2013). Adverse action “refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate

⁵ Respondent does state that Complainant’s protected activity was not a contributing factor. That, however, is a separate issue.

⁶ Respondent’s argument is an anticipated rebuttal to a claim under 49 U.S.C. § 20109(c). However, Complainant has not stated in any of his filings in this matter that his claim falls under § 20109(c). Complainant has maintained that this claim falls under § 20109(a)(4). As such, I will construe Respondent’s argument as a rebuttal to Complainant’s argument that Amtrak’s failure to pay his medical bills constitutes adverse action.

employer actions.” *Williams*, ARB No. 09-018, at 15. Not every action taken by an employer that makes an employee unhappy constitutes an unfavorable personnel action. *Hirst v. Southeast Airlines, Inc.*, ARB Nos. 04-116, 04-160, ALJ No. 2003-AIR-47, slip op. at 9 (ARB Jan. 31, 2007). As the Board has previously noted, “personnel actions that cause the employee only temporary unhappiness do not have an adverse effect on compensation, terms, conditions or privileges of employment.” *Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 97-ERA-52, slip op. at 12 (ARB Feb. 29, 2000) (quoting *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996)). Nonetheless, unfavorable personnel action should be interpreted broadly “consistent with the expansive construction required of whistleblower statutes.” *Menendez*, ARB No. 09-002 and 09-003 at 20. This broad interpretation of adverse action is necessary to accomplish the “strong protection expressly called for by Congress.” *Williams*, ARB No. 09-018, at 15.

Fricka’s 2011 and 2012 Annual Reviews

Complainant argues that Respondent took adverse action against him by giving him a low score on his annual evaluation in 2011. Fricka received an overall score of “2.11 – Competent” on his 2011 mid-year review. Tr. 24-25; JX 5 at 1. The rating period covered October 1, 2010 to March 31, 2011 – the time period before Fricka’s motorcycle accident. JX 5 at 1. However, on his 2011 yearly review, Fricka’s overall score dropped from 2.11 to “1.43 – Needs Development.” JX 9 at 1. This, according to Fricka, was “absolutely the worst score [he] ever heard [*sic*].” Tr. 25. The rating period covered the entire year, *i.e.*, the first half of the rating period from October 1, 2010 to March 31, 2011 (for which Fricka had been rated at 2.11), and the second half of the rating period during which Frick worked about two months before his accident and about three weeks after his return to work. JX 9 at 1; Tr. 24. Fricka’s score thus dropped .66 points between the mid-year and final review.

Despite Complainant’s assertion that the 2011 annual review cost him a \$2,000 bonus, the record clearly shows that Amtrak did not begin awarding bonuses until 2012. Edward Witham, the mechanical superintendent in charge of the car department at Amtrak’s 14th Street station, acknowledged that Fricka’s rating had been reduced from “2.11 – competent” at mid-year to “1.43 – needs development” on the final review. Tr. 65. However, he testified that there was no performance bonus offered to employees for the 2011 performance review period and that Fricka therefore would not have received a bonus regardless of his final rating. *Id.* at 67, 68. Moreover, according to Witham, no one in the entire mechanical department received a rating higher than “2” for 2011. Witham further testified that he had credibility issues (which he characterized as involving “honesty and integrity”) with Fricka at the time of the mid-year review, and he stated there had been no improvement in Fricka’s performance with respect to those issues by the end of the year. *Id.* 69-70.

Similar to Witham’s testimony, Herdegen testified that the mechanical department scored an overall rating of 2 in 2011. He also testified that Fricka’s rating was lowered because he did not feel that Fricka exceeded his performance goals which would justify a rating of “3,” and LeBeck was unable to demonstrate that Fricka’s performance justified such a rating. *Id.* at 90, 93. According to Herdegen, Fricka “didn’t always meet expectations” in the first part of 2010 or 2011, but his performance improved in the fall of 2011 (*i.e.*, during the FY 2012 rating period) after he returned to work and was transferred to the Brighton Street station. *Id.* at 91.

While Fricka may have been unhappy with the change in his 2011 performance review from 2.11 to 1.43, there is simply no evidence of any material impact on Fricka's employment. See *Gutierrez v. Univ. of California*, ARB No. 99-116, ALJ No. 98-ERA-19, at 7-8 (ARB Nov. 13, 2002) (finding adverse action where employer's negative comments in employee's Performance Assessment impacted employee's salary determination); *Sasse v. Office of the U.S. Attorney, U.S. Dep't of Justice*, ARB Nos. 02-077, 02-078, 03-044, ALJ No. 98-CAA-7, at 19 (ARB Jan. 30, 2004) (holding complainant failed to show that negative appraisal was material adverse action). While Fricka claims he was not awarded a bonus because of the lowered rating, which is the only harm allegedly incurred because of the rating, Witham's and Herdgen's testimony that none of Amtrak's employees were entitled to a bonus in 2011 is uncontradicted by any evidence other than Fricka's unsubstantiated belief that he would have received a \$2,000 bonus if his evaluation score had remained the same throughout the year. I find Witham's and Herdgen's testimony credible and thus find that Fricka has failed to sustain his burden of proving that his 2011 performance rating constituted an unfavorable personnel action.

As noted above, Fricka also claims that his 2012 performance evaluation score was reduced and this reduction cost him a \$2,500 bonus that year. Tr. 29-30. Fricka testified that the range of review scores changed during 2012 from a scale of 1 through 4 at the beginning of the year to a range of 1 to 3 by the end of the year. *Ibid.* He further testified that LeBeck originally rated him with 3's and 4's, but after LeBeck submitted the performance evaluation to Witham for review, Witham rejected it. *Id.* at 30. The 2012 rating was eventually approved by Witham when the rating was reduced by LeBeck to 2. *Ibid.*; RX 7.

According to Witham, entitlement to the \$2,500 bonus in 2012 required a rating of 3. Tr. 67, 34. He further testified that 2012 was the first year a performance bonus was offered and stated that Fricka had never had an exemplary performance rating at anytime before 2012. *Id.* at 68-69. According to Witham, no one, including himself and his entire staff, received higher than a rating of 2 in 2012. *Ibid.* Under the new three-point scale, he testified, no one earned an exemplary rating. *Id.* at 70. Herdgen similarly testified that Fricka's job performance in 2012 was only "satisfactory" and he had never had a performance evaluation which would be "above average." *Id.* at 92. The 2012 performance review form completed for Fricka reflects his "Overall Rating" as "2 – Met Goals." RX 7. The "Performance Goals Summary" portion of the form similarly reflects a rating of "2 – Met Goals," and notes that Fricka's "Behavioral Goals" were "Met." *Ibid.*

Based on the foregoing, I again find that Fricka has failed to carry his burden of proving that he sustained an unfavorable personnel action with regard to his 2012 performance review. Fricka admits that the rating scale changed from a four-point scale at the beginning of the year to a three-point scale by the end of the year, and Witham testified that no one in his department, including himself, scored higher than a 2 for the year. Even with a rating of 2, however, consistent with Witham's testimony, Fricka had demonstrated substantial improvement in his performance and had "gotten quite a bit better." Tr. 69; compare JX 9 ("Competent" for "Success Factors" but "Needs Development" for "Performance Goals" and "Development Plan" with RX 9 ("Met Goals" for all categories). Herdgen similarly testified that Fricka didn't meet expectations in 2011 but his performance improved in 2012 after he was transferred to the

Brighton Street station as reflected in his annual review. Tr. 91. Despite this improvement, however, he only “met” expectations and, consequently, like other employees in his department, was not entitled to a \$2,500 bonus for 2012. The 2012 rating thus does not constitute an unfavorable personnel action.

Failure to Pay Medical Bills

Complainant also argues that he suffered an unfavorable personnel action when Amtrak failed to pay his medical expenses resulting from injuries suffered during the May 31, 2011 motorcycle accident. Complainant notes that he has had to submit his bills to his own insurance provider for payment, and claims that there are “a number that are still outstanding, and co-pays and whatnot that have just not been paid.” Tr. 36. Fricka submitted an itemization of medical expenses in the amount of \$297,797.21, although it is unclear how much of that amount, if any, is still outstanding. *See* CX 2. Complainant testified he believed these outstanding medical expenses hurt his credit score when he purchased a car and that they will continue to hurt his credit score in the future. Tr. at 37.

Respondent argues that it did not pay Fricka’s medical bills because it determined his injury was not work-related and these expenses would be covered by his private insurance, not by FELA.⁷ RPHB 4. According to Respondent, “No injury that is considered not-on-duty or Class B under FRA guidelines is ever covered under FELA. That is the purpose of the distinction between Class A (worker-on-duty) and Class B (worker-not-on-duty) injury classifications.” *Ibid.*

Despite the fact that I have concluded Respondent incorrectly determined Fricka’s injury was not work-related, I agree with Respondent that Complainant has failed to establish that he suffered an unfavorable personnel action when Amtrak classified his injury as not work-related. The undisputed evidence shows that Fricka was not discharged, demoted, suspended or reprimanded for claiming his motorcycle accident was an on-duty injury. *See* 49 U.S.C. § 20109(a). Nor is there any evidence that he was subject to “discrimination,” *i.e.*, that he was intimidated, threatened, restrained, coerced, blacklisted or disciplined because he claimed the injury was work-related. *See* 29 C.F.R. § 1982.102(b)(1). While I recognize the regulation does not limit “discrimination” to just those actions set forth above, the ARB has clearly recognized that before an action can be considered “unfavorable,” it must be the sort of action “that would dissuade a reasonable employee from engaging in protective activity.” *Menendez v. Halliburton, Inc.*, *supra*, ARB No. 09-002 and 09-003, ALJ No. 2007-SOX-5, at 20. No reasonable employee would ever be dissuaded from reporting an injury as “work-related” simply because he thought the employer might not agree with his claim that the injury occurred on the job. On the contrary, failing to report the injury as work-related would ensure that it would *never* be covered under FELA as an on-duty injury. As long as the employee has a good-faith belief that the injury occurred while he was on the job, the incentive, therefore, is for the employee to report it as a work-related injury. Amtrak’s determination in this case that Fricka’s injuries were not work-related thus does not constitute an unfavorable personnel action.

⁷ The Federal Employers Liability Act provides employees of covered railroad carriers compensation for injuries if the injury is the result “in whole or in part from the negligence” of the railroad carrier. 45 U.S.C. § 51 *et seq.* In order to recover under FELA, the employee must bring an action in state or Federal court. *Ibid.*

Transfer to Brighton Park

Complainant also argues that he suffered an adverse action when Respondent transferred him from the Chicago 14th Street Station to the Brighton Park station without notification or justification. *See* Tr. 17.

While an involuntary transfer may constitute an adverse action, the transfer must be *materially* adverse to qualify – that is, it must be “activity that would dissuade a reasonable employee from engaging in protected activity.” *See Menendez*, ARB No. 09-002 and 09-003, at 20; *Jenkins v. E.P.A.*, ARB No. 98-146, ALJ No. 88-SWD-2, at 21 (ARB Feb. 28, 2003); *McClendon v. Hewlett Packard, Inc.*, ALJ No. 2006-SOX-29 (ALJ Oct. 5, 2006). In *Jenkins*, for example, the ARB held that the complainant did not suffer an adverse action when she was transferred to a different section in her office with new assignments. *Jenkins*, ARB No. 98-146, at 21-22. The ARB found that, although the complainant may have experienced a “bruised ego,” she failed to show “a consequential loss of promotional opportunities or other perquisites of employment.” *Id.* at 22. The ARB reasoned that her transfer was similar to a lateral transfer, which does not entail “a demotion in form or substance.” *Id.* at 21 (internal citations omitted). It further noted that lateral transfers generally do not rise to the level of a materially adverse employment action. *Ibid.* Decisions by Federal courts are consistent with *Jenkins* in finding that a transfer must negatively affect the employee’s financial situation or the employee’s current or prospective employment opportunities. *See Vieques Air Link, Inc. v. D.O.L.*, 437 F.3d 102 (1st Cir. 2006) (affirming ARB’s finding that complainant’s transfer to work location was adverse action because it amounted to constructive discharge - it effectively forced him to relocate his family or quit); *McClendon*, ALJ No. 2006-SOX-29 (finding complainant did not suffer adverse action when he was transferred because it did not result in lower pay or interfere with his ability to work, but he did suffer adverse action when transfer resulted in diminished work and limited scope); *Mandreger v. The Detroit Edison Co.*, 88-ERA-17, at 7 (Sec’y Mar. 30, 1994) (finding transfer was adverse action because it placed complainant in a position with less opportunity to earn overtime pay and advancement); *Johnson, et al v. Old Dominion Sec.*, 86-CAA-3, -4, & -5, at 6 (Sec’y May 29, 1991) (finding complainants’ transfers to different facility was adverse action because they received substantially reduced wages and benefits).

I find that Fricka’s transfer to Brighton Park Station in this case was not an adverse action because Complainant failed to show that the transfer was materially adverse. For example, Complainant has failed to demonstrate that his transfer changed his “title, benefits, duties, [or] responsibilities” in any meaningful way. *Jenkins*, ARB No. 98-146, at 21. Nor is there evidence that Fricka was demoted or faced fewer opportunities for promotion. *Ibid.* Similarly, he has not shown that he lost salary or benefits at his new position in Brighton Park, or that his responsibilities as general foreman changed. Rather, Fricka acknowledged that he has kept the same position since 2000 and that he has not encountered any interference with his ability to work since being transferred. Tr. 15. In fact, the record reflects that his work performance has improved since moving to Brighton Park. *Id.* at 69, 91. Equally important is the fact that Fricka’s transfer was *voluntary*, not involuntary. Fricka previously informed his supervisors that he would be willing to move to Brighton Park several times. *Id.* at 37-38. In all,

Complainant's transfer from the 14th Street Station to Brighton Park was not an adverse action under the FRSA.

V. CONCLUSION

A preponderance of the evidence establishes that Complainant engaged in protected activity under the FRSA when he reported that he had a work-related injury. However, the evidence does not establish that Fricka suffered any unfavorable personnel action as a result of that protected activity. Consequently, Fricka has failed to establish that Amtrak violated the whistleblower provision of the FRSA.

VI. ORDER

Based on the foregoing, Complainant's whistleblower complaint under the FRSA is hereby **DISMISSED**.

STEPHEN L. PURCELL
Chief 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).