

**U.S. Department of Labor**

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**Issue Date: 07 July 2015**

**CASE NOS.: 2013-FRS-00072  
2013-FRS-00073  
2013-FRS-00074**

In the Matters of:

**KENNETH ROBINSON,**  
Complainant

and

**JUSTIN HOOT,**  
Complainant

and

**JACKIE SIMS,**  
Complainant

v.

**BNSF RAILWAY COMPANY,**  
Respondent

**BEFORE: LARRY W. PRICE**  
Administrative Law Judge

**DECISION AND ORDER**

These consolidated cases arise under the whistleblower protection of the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L. No. 110-53. (Aug. 3, 2007), as further amended by Pub. L. No. 110-432 (October 16, 2008). The FRSA prohibits covered employers from discharging or otherwise discriminating against employees who engage in certain protected activities related to the terms or conditions of employment.

On January 26-30, 2015, a formal hearing was held in Houston, Texas. The parties were afforded a full opportunity to adduce testimony, offer documentary evidence, and submit post-hearing memoranda. Complainants' exhibits 1-47 and 49-71 were admitted into evidence, and Respondent's exhibits A-FFF were admitted into evidence. ALJ Exhibit 1, the parties' stipulations, was also admitted into evidence.

This decision is based upon a full consideration of the record.<sup>1</sup> My findings are based on a complete review and consideration of the relevant arguments of the parties, evidence submitted, applicable statutory provisions, regulations, and precedent. Although not every exhibit in the record is cited below, I have carefully considered the entire record in arriving at this decision.

## I. STATEMENT OF THE CASE

Complainants Robinson, Hoot, and Sims contend that they made a safety complaint on November 26, 2012, when they made cab condition claims and when Complainant Hoot reported through Respondent's automated VTR hotline that the bathroom on Locomotive 4317 was out of compliance and needed servicing. Respondent disputes that the report was made in good faith and further contends that Complainants' actions do not constitute a complaint of a safety violation under the FRSA. Respondent terminated Complainants for the stated reason of making dishonest cab condition claims. Complainants contend that their terminations were in retaliation for making safety complaints on November 26, 2012, in violation of the FRSA, and request statutory remedies.

## II. STIPULATIONS

The parties have stipulated, and I find:

1. At the end of each shift, certain BNSF employees, including engineers, conductors, and brakemen, submit time tickets requesting pay for that day. BNSF's Compensation Systems reviews and processes the time tickets for payment.
2. On November 26, 2012, Robinson was the engineer, Hoot was the conductor, and Sims was the brakeman on the L GFC 241 job ("241 Local").
3. In 2012, Robinson and Hoot regularly worked the 241 Local with Rusty Gay. On November 26, 2012, Sims worked the 241 Local instead of Gay.
4. The 241 Local takes a freight train south from BNSF's Houston South Yard in Houston, Texas to BNSF's Galveston Yard in Galveston, Texas.
5. On November 26, 2012, the 241 Local used locomotive BNSF 4317.
6. At or around 2:00 a.m. on November 26, 2012, Complainants went on duty at the Houston South Yard.

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<sup>1</sup> References to the record are as follows: Transcript – Tr.; Complainants' Exhibits – CX; Respondent's Exhibits – RX; Stipulations – ALJ 1.

7. Before departing the Houston South Yard on November 26, 2012, Complainants “built” a train by picking up cars on various tracks pursuant to a work order they received from a yardmaster.
8. BNSF has a Voice Train Recording system (“VTR”) that employees can call to provide information about trains. The VTR system uses automated prompts and voice recognition to record information.
9. A van picked up Complainants from Algoa, Texas and took them back to the Houston South Yard.
10. Complainants timely filed a complaint with OSHA on May 10, 2013. The Secretary of Labor issued findings dismissing Complainants’ complaint on July 17, 2013. Complainants timely filed objections to the Secretary’s findings on July 24, 2013 and requested a hearing before this Court.

### **III. ISSUES**

1. Whether Complainants engaged in protected activity.
2. Whether the protected activity was a contributing factor to the adverse action(s).
3. Whether Complainants are entitled to remedies under the FRSA.

### **IV. SUMMARY OF RELEVANT HEARING TESTIMONY**

#### *Complainant Justin Hoot*

Complainant Hoot began working for Respondent in June 2004 as a conductor. Conductors “run the job.” They handle talking with the yardmasters, trainmasters, and dispatchers and run the safety job briefings. (Tr. 53).

Hoot testified that he is required to follow approximately 500 safety and operating rules, including the General Code of Operating Rules, air brake handling rules, general safety rules, bulletins, general orders, and federal laws. He has been required to take tests about these rules and has passed each of his tests. Hoot does not have all the rules memorized and “constantly” refers to rule books for guidance. (Tr. 59-61).

On a three-person job, both the foreman and the brakeman are conductors. (Tr. 63).

The toilet compartment on Locomotive 4317 is “one step down and five feet away” from the conductor’s seat. The three-person crew sits and works in a common area approximately 5’x6’. The toilet compartment itself is approximately 3’x5’. It has no sink or any fresh water supply. On the toilet is a handle one must pump multiple times to “flush” the toilet, which pulls human waste into a reservoir tank holding a water and chemical mixture. On the left of the toilet system is a vent. (Tr. 64-69).

The toilet compartment is cleaned when a crew reports the need. A company services the locomotives at certain locations. Hoot testified that it is not his job to clean or maintain the toilet. But, as a conductor, he is required to be familiar with the cleanliness parameters for the toilet compartment. (Tr. 70-71).

The engineer aboard the train is required to perform the daily inspection. Nonetheless, if Hoot, the conductor, notices a toilet compartment out of compliance, he reports it to mechanical according to the operating rules. At the initial terminal, toilet issues are reported to the yardmaster. The yardmaster responds by either servicing the toilet or replacing the locomotive. If an issue is discovered en route, the rules require employees to report the issue to mechanical for service at the next destination. Hoot has reported toilet issues to the yardmaster in the Houston South Yard. En route, there are no supervisors on the train. (Tr. 71-72, 74).

Hoot was familiar with the definition of “unsanitary” in his capacity as conductor through safety briefings at work. He defined unsanitary as “[h]uman waste, trash, excessive amounts of trash, toilet paper..., clogged toilets..., just filthy trash or excessive amounts of dirt.” He added odor to the definition, explaining that crews do not want to be exposed to odor while eating or using the restroom. The locomotive engineer performs the initial or daily inspection to determine whether the toilet compartment is unsanitary. Hoot, as a conductor, did not have that responsibility. (Tr. 75-76).

Hoot testified that Respondent has the right to review and deny bargained-for pay claims. He has experienced that “multiple times” in his career. When Respondent denies a claim, the employee may forward a request to his union representative to appeal the denial. Hoot has had claims denied and later paid through this process, and has also experienced denied claims affirmed. (Tr. 80-81).

For cab condition claims, an individual at the South Yard reviews the claim and either declines or accepts it. A cab condition claim is a request for pay. Making a claim does not trigger a work order. To contact Mechanical, an employee calls the Voice Train Reporting system, which is an automatic system that generates a work order to Mechanical. As an employee, Hoot had the responsibility of reporting defective equipment. Employees are not obligated to document cab condition claims or VTR defects by photograph. Hoot further testified that the FRA disallows mobile phone usage during operating hours with some exceptions. Hoot stated that he chose “pretty much to leave it off during a trip.” (Tr. 82-86).

If an employee does not report a defective switch, he could be terminated for putting other employees at risk. Respondent’s policy requires reporting the defect to be fixed. (Tr. 88).

Before November 26, 2012, Hoot had submitted cab condition claims for refrigerators, conductor lights, cab seals, and toilets. If he thought the conditions rose to the level of a safety issue, he would take the extra step of reporting the condition to upper management. (Tr. 88-89).

On November 26, 2012, Hoot reported to work at 2:00 a.m. Sometimes, the crew had to wait for engines on the Memphis/Houston train before going beginning their work. Hoot testified

that late trains or engines had no time for the toilet compartments to be serviced properly. He also stated that other crews “didn’t help out or didn’t keep [the toilets] clean.” (Tr. 94-97).

Hoot and the other Complainants began their work at 3:00 a.m. Debbie Billings, a yardmaster, instructed Complainants to take “only” Engine 4317. (Tr. 98-99).

On November 26, Complainants did not have to wait on a locomotive. Once aboard the engine, the crew built the train. The train departed Houston at 3:55 a.m. and arrived in Pearland around 6:00 a.m. Without delays, the trip takes ten minutes. Hoot testified that he and the other Complainants had to wait for authority to move. (Tr. 103-07).

Once they arrived in Pearland, Complainants had to wait for the yardmaster to give them authority to enter the yard. Up until that point, Hoot had not used the restroom. Hoot testified that Complainant Robinson called out to Hoot, “Ooh, come look at this dirty toilet,” shortly after the crew’s Pearland arrival. Hoot stated that he first noticed the smell and then saw “blue chemical waste at the bottom left on the floor running towards the drain on the right.” He testified that the toilet compartment was not sanitary because he could see the chemical waste. He explained that he referred to the liquid on the floor as “chemical waste” because he knows that chemical mixes with the waste that is in the toilet. Hoot told Robinson, “we’re going to have to report it.” At that point, he and Robinson closed the door and went back to their duties, waiting on the Pearland yardmaster. (Tr. 108-11).

Hoot explained that he did not report the toilet to the yardmaster at Pearland because “we never have.... Because it was en route defect.” The train’s ultimate destination was Galveston, which is where the train would be serviced. Respondent never instructed Hoot to report defects immediately to the yardmaster. Hoot testified that there is no such rule. He also did not report the defect to the dispatcher, whose job it is to run the trains. (Tr. 112-13).

After leaving Pearland, Complainants headed toward Galveston. Because the crew was approaching their twelfth hour of service, they were ordered to secure the train in Algoa, which is 26 miles from Galveston. Hoot reported the toilet using the VTR system once he debarked the train. A ticket was generated for Mechanical to service the toilet. In other situations where Mechanical receives a service order, the ticket form will note “no defect” if service is not necessary. In this situation, Mechanical noted that the toilet was serviced. (Tr. 113-18).

Before leaving the train, Hoot took a picture of the toilet compartment to mark the blue chemical on the floor and on the drain. The crew left the train in Algoa six to seven hours after having been in Pearland. The toilet odor was not as strong in Algoa as it had been in Pearland, and the chemical mixture had mostly drained. Hoot testified that the toilet had been unusable because to use it would track the chemical into the cab compartment where the crew works. (Tr. 118-22).

In the van from Algoa to Houston, Hoot testified that he told the other Complainants that he reported the toilet to the VTR and that they would need to put in a claim for it. Once back at the yard office, Hoot completed a fill-in-the-blank computer form to make his time claim for the defective toilet. The cab condition claim does not report the toilet to get fixed. On the form, Hoot

noted that he reported the defect to Mechanical and further described the toilet defect as “Unsanitary with waste all over. Waste, blue chemical all over floor in compartment. Not allowing use of toilet.” Hoot testified that “unsanitary” included the odor. (Tr. 122-27).

Respondent denied the ticket, noting that the toilet was not defective and that it had been inspected by the terminal manager prior to departure. The cab condition claim would have paid \$50 for the claimed 25 miles. Shortly after the denial, Respondent informed Hoot by letter that his cab condition claim would be the subject of a formal investigation. (Tr. 127-29).

Locomotive 4317 was the lead locomotive on November 26. Hoot does not recall if more than one locomotive was on the train. His time ticket shows that another locomotive, BNSF 5220, was on the train at some point during the day. (Tr. 150-53).

Being assigned to a particular locomotive is not out of the ordinary. Hoot testified that Debbie Billings’s statement, “Per John Kennedy, you have to take the BNSF 4317 and only the 4317,” did strike him as unordinary. (Tr. 154).

When Hoot looked at the toilet, it was not over-flowing. He could see that the reservoir was full. (Tr. 158-59).

Hoot reported human waste on the floor but did not actually see human waste. He testified, “it would be...common sense” to know that the blue chemical on the floor is mixed with waste. Hoot admitted that he assumed human waste was mixed with the blue chemical. He testified that he believed the toilet compartment presented a safety issue that needed to be cleaned up and repaired. (Tr. 160-61).

Hoot did not notify the dispatcher of the toilet compartment. He could have, but “nobody reports unsanitary toilets or cab conditions to the dispatcher.” He testified that the toilet compartment presented a hazardous safety condition when being used but not with the door shut. Hoot testified that he also did not contact the Pearland yardmaster. He explained that his instructions are to report defects to the yardmaster “where we make the train up.” Any defect found afterwards is an “en route” defect, which is not reported to the various passing yardmasters or dispatchers. (Tr. 164-65). Hoot testified that if he discovers a hazardous safety condition en route, his only obligation is to report it to Mechanical via the VTR system. He is not obligated to report the en route condition to a supervisor. (Tr. 167-68).

Hoot confirmed that he had two locomotives on the train, the lead locomotive (4317) and the trailing locomotive (5220). If the trailing locomotive is “lead qualified” and facing the right direction, the crew can switch the trailing with the lead. He does not recall if the trailing locomotive went to Algoa or stopped in Pearland. (Tr. 170-71).

Hoot testified that he discovered the unsanitary toilet around 6am and did not leave Pearland until noon. He could not say how long the train had actually been in Pearland. It was on the “main line” for six hours before leaving. During that delay, Hoot did not report the toilet condition to anyone. He acknowledged that the empowerment policy authorizes employees “to

stop or disengage from a procedure or activity if they feel their safety is compromised.” Hoot testified that safety had not been compromised. (Tr. 171-73).

If there had been a serious issue that put crew members in danger, Hoot would report the condition immediately. He would not continue operating the train. Some safety issues—like malfunctioning brakes or whistles—have workarounds that allow for continuous operation of the train. The engineer is responsible for tagging en route defects on the locomotive. (Tr. 183-85).

Hoot included on his cab condition claim that chemical was leaking from the toilet or pooling. He explained that he wrote “unsanitary” to mean the odor. He could have added additional details but testified that is not necessary given what he had already reported on the ticket. (Tr. 189-91).

Hoot testified that the cab condition claim requests pay and also informs the yard superintendent of the safety issue. The trainmaster has to look at the time ticket to verify that there had been a safety issue. Hoot testified that the cab condition claim is a second way (in addition to the VTR system) of informing the company and superintendents of a safety issue. Reporting to Mechanical through the VTR system is mandatory. (Tr. 201-02).

Hoot compared the photographs taken by Kennedy in Houston to the one Hoot captured in Algoa. He described different discolorations between the photographs and noted further discoloration on the drain. Hoot testified that the entire drain does not show on his photograph, particularly the area through which liquid passes. (Tr. 209-12).

Hoot clarified earlier testimony and testified that he believed Locomotive 4317 had been sitting in the yard for eight hours before Hoot’s shift started. It had not been delayed or rushed from one job to another. (Tr. 224).

Hoot was aware that the locomotives are inspected each day. One of the trainmasters showed Hoot a photograph of a toilet compartment and asked Hoot if it looked clean. Hoot denied telling the trainmaster that he would make a claim if he saw even a “speck.” (Tr. 224-26).

A “dog catch” crew took the train from Algoa to Galveston. Hoot is unaware whether that crew cleaned the compartment. Conductors, engineers, and brakemen are not responsible for cleaning toilets. There are no mops, buckets, or cleaning supplies, other than alcohol wipes, available to the crew. Hoot has cleaned toilet lids but never the floor. He has squirted bottles of water on the floor on occasion. Hoot expects the toilet to be sanitary and usable. (Tr. 226-30).

#### Complainant Kenneth Robinson

As the engineer, Robinson was responsible for performing daily inspections and noting whether there were any noticeable defects. If the train had already been inspected that day, an inspection card would be marked. The daily inspection includes the toilet compartment. When Robinson boarded the train on November 26, he did not have to perform an inspection. Nonetheless, he looked for signs of defects. (Tr. 251-53).

For defects arising en route, employees take the train to the next station to be fixed. This includes toilet compartment problems. Robinson was required to report toilet problems to Mechanical. He has never called the Safety Issue Resolution Office for those defects. If a toilet defect is discovered at the initial terminal, either the toilet is cleaned and serviced or the engine is switched. En route, the train is taken to where it can be fixed. (Tr. 255-57). Robinson was required to report unsanitary toilets. (Tr. 259).

Robinson testified that he did not falsify the toilet cab condition claim. (Tr. 261).

The yardmaster assigned Complainants to their engine, and Complainants reported to the locomotive at 3:00 a.m. Robinson inspected the toilet compartment at that time and found no defects. (Tr. 263). After the train arrived between the Pearland and Algoa switches around 6am, Robinson noticed the toilet leaking on the left side going to the drain, noted a smell, and saw chemical and waste mixed together on the floor. He did not report the defect to the yardmaster because “That’s not my job.” (Tr. 265-67).

While in Pearland, Robinson recalls having done some “switching” work. He also thought they had brought two locomotives to Algoa but was not sure. (Tr. 268). After Robinson debarked the train in Algoa, he left a note informing the dog catch crew that the toilet had been reported. He did not have any “bad order” or non-compliance tags to leave on the toilet. (Tr. 272-73). Once Robinson discovered that Respondent was taking photographs of the locomotives, he told Complainant Hoot, “we might have to start taking our own photos around here.” (Tr. 275).

Robinson testified that he made the cab condition claim because the condition was “unsafe,” and he was also requesting pay. He explained that “unsanitary” means unsafe and covers odor and human waste. He testified that he put in the claim to report the safety issue. (Tr. 276-78). Robinson testified that the drainage had dried by Algoa but that the toilet was not sanitary. He stated that there remained a safety issue because the toilet needed to be fixed to prevent the problem from recurring. (Tr. 280-81).

Robinson acknowledged that workmen wear their work boots throughout the train yard and on the train. (Tr. 315).

Robinson admitted that he did not see any human waste in the blue chemical. Because of the leaking on the left of the toilet, he found the compartment to be unsanitary and non-compliant. He testified that he is not required to do more than report the condition to the automated VTR system. He acknowledged that Respondent’s policies require an engineer to take several steps, two of which include marking non-compliance on the daily inspection report and leaving the report with the locomotive. Robinson testified that he did not have to complete the inspection report during his tour of duty. He acknowledged that he did not report the non-compliant condition—a third policy requirement—to the dispatcher or mechanical desk because he instructed Complainant Hoot to do it. Robinson also acknowledged the policy requirement that defects are reported as soon as possible. He testified that he identified the condition at 7am, and Hoot reported the defect at 12:53 p.m., which was as soon as possible. Robinson did not think the toilet compartment was a “big deal. It was an issue that was unsafe... [W]e went on about our business.” He testified that he complied with the fourth requirement—leaving a note



for the relief engineer. He also stated that he could not comply with the fifth requirement to leave a non-compliance tag because there were no tags on the engine. Robinson also testified that he did not leave a tag because the train was going to Galveston where it would be serviced. (Tr. 320-27, 329-32).

Robinson testified that a non-compliant locomotive may remain as the lead locomotive. He also acknowledged Respondent's policy requiring the removal of the lead locomotive in case of non-compliance, with a few exceptions. Robinson testified this only applies at the initial terminal because that is where engineers conduct the locomotive inspections. He agreed that he could have switched the lead locomotive in Pearland during their six-hour wait. (Tr. 333-36).

Robinson stated that he could identify dampness in Complainant Hoot's photograph. He testified that the photograph was not made part of Respondent's investigation or termination hearings. (Tr. 339-40).

Robison acknowledged that he is required to report a safety issue but not required to make a cab condition claim. He explained that the only reason to turn in a cab condition claim is to get paid. (Tr. 341).

Robinson testified that a report was always made to the VTR regarding a cab condition claim. He stated that he instructed Complainant Hoot to make the report when they got off the train in Algoa. Robinson testified that he had previously contacted the trainmaster to report a condition at the initial terminal. He stated that he would not start the trip unless the locomotive was lead-qualified. He testified that an engineer is not allowed to continue with a locomotive if it becomes unqualified to lead en route. (Tr. 976-79).

*Jerry Parks – Union Vice Local Chairman and Conductor*

Parks testified that he is familiar with the term "unsanitary" on the job. He considers unsanitary conditions to be unsafe. While he testified that crews will clean toilet compartments, Parks admitted that he has never done so. (Tr. 384-85). He later testified that he cleaned the seating area with Clorox or Lysol and swept the floor. Parks never mopped. (Tr. 397-98).

Parks acknowledged that Respondent may deny claims that it deems invalid and agreed that pay claims must be truthful under the operating rules. (Tr. 406-07).

*Craig Knight – Former Local Chairman and Engineer*

Knight testified that he heard Steven Curtright, the General Manager for the Gulf Division, say that he did not agree with cab condition claims and that the crews should clean the bathroom themselves. Knight stated that Curtright made this comment during a meeting with "a bunch of local chairmen and bunch of safety teams...." Knight also testified that Bob Boemio, a superintendent, stated "We can fire them and if they come back after two years, that's okay... We can afford to do it." Knight further testified that Curtright said, "If Mr. Hoot doesn't get back, it will [be] because of his two personal injuries." (Tr. 411-14).

Knight had been terminated for violating a company rule, which termination he has appealed. He does not deny having violated the rule. (Tr. 415).

Knight testified that Curtright made the statements regarding cab condition claims during the course of the division safety meeting. Boemio's statement occurred at a local chairman meeting in Pearland at which eight local chairmen were present. At the division safety meeting, there were at least 100 people, most of whom were union representative employees and union officers. Knight testified that Curtright made the comment about Complainant Hoot's personal injuries during a face-to-face meeting in Curtright's office. (Tr. 417-20).

Knight represented Complainants Hoot and Robinson during their termination investigations. Hoot had sent Knight the photograph of the toilet compartment. Knight did not attempt to enter the photograph as an exhibit. Both Hoot and Robinson asked Knight to use the photograph at the hearing. Knight testified that he "forgot" to do so. (Tr. 426-28).

Angela Robinson – Complainant Robinson's Wife

Mrs. Robinson is a locomotive engineer for Respondent. (Tr. 430). She testified that "[n]inety percent of the time, [the toilet compartment is] unusable...." She brings aboard Lysol to clean the compartments. She testified that other engineers have to clean the toilets if they want to use them. (Tr. 432-34).

Mrs. Robinson acknowledged that the compartment floor may have stains even after she cleans. (Tr. 442).

Complainant Jackie Sims

Sims testified that "unsanitary" means unusable or unsafe, if not dangerous, and can refer to foul odors. He also understood "unsanitary" to include blue chemical on the floor and chemical mixed with human waste on the floor. (Tr. 458-59). Cab condition claims allow an employee to be paid for working with an inconvenient or unsafe factor. (Tr. 465-66).

Once the train arrived at Pearland, Sims took a nap as they waited for another train to finish. He awoke when the yardmaster in Pearland gave the crew permission to move. Sims testified that he opened the door to use the restroom and smelled a foul odor. The lights in the toilet compartment were off. Sims testified that he closed the door because he did not want to get sick from the smell of the chemical. Sims thought the compartment was unsanitary because of foul odor. (Tr. 472-75).

Sims testified that he did not speak with Complainants Robinson or Hoot about the toilet until after they debarked in Alcoa. Hoot mentioned that he had to put in a claim, and Sims replied, "Oh, God, that's what that smell was." (Tr. 475-76). Sims had not seen the inside of the toilet compartment. (Tr. 477).

Sims testified that he believed there was a mixture of chemical and feces in the toilet compartment based upon what he smelled and what Complainants Robinson or Hoot discussed

during the van ride to Houston. He reported on the cab condition claim, “unsanitary waste all over, waste on the floor and non-compliant not allowing use of optional toilet....” (Tr. 478-80).

Sims further testified that he would not have put in the cab condition claim if he had not smelled the odor. (Tr. 483).

Sims testified that the train took 5-10 minutes to travel to Pearland. (Tr. 498).

Sims did not enter the toilet compartment. The light was off, and he did not see the condition of the toilet or floor. The toilet compartment does not contain a window to let in natural light. Based on the smell alone, Sims believed the toilet compartment violated the FRA. He agreed that he did not know exactly what the smell was. (Tr. 501-02).

After performing work in Pearland, Sims and the other Complainants had a second delay before the train could depart. During that second delay, Sims did not contact the dispatcher about the toilet. Only Complainant Hoot could have done so. Sims did not ask Hoot to contact the dispatcher. Sims also did not contact the yardmaster in Pearland. He testified that he “didn’t think about it.” (Tr. 509-11).

Sims disagreed that an alternative engine was available in Pearland to exchange. (Tr. 512-13). He does not recall whether there was one available or not. (Tr. 515-16).

During the time in Pearland, Sims never spoke with the other Complainants about the restroom. Sims did not report the restroom to the VTR because it was not his job. (Tr. 516-17).

Sims testified that he is required to enter a cab condition claim to report an unsafe condition, even where the condition had been reported to the VTR. Safety issues may also be reported to the safety hotline, a trainmaster, or any supervisor. (Tr. 519-22).

Sims stated that he used the particular language on his claim form after discussion with the other Complainants in the Houston office. He testified that he further elaborated on “unsanitary” to include human waste on the floor because claims have to “be more explanatory.” (Tr. 525-27).

Sims has used disinfectant wipes to clean the toilet seat but not the floor. (Tr. 545).

Jason Ringstad – General Director of Labor Relations

When encountering a hazardous safety condition, an employee is supposed to contact a supervisor, dispatcher, yardmaster, the maintenance desk, or the safety hotline. An employee could also raise a safety concern at a local safety committee. (Tr. 556-57). A cab condition claim is not a method by which employees report safety concerns. (Tr. 570). The claim is a request for pay and does not report an FRA violation. (Tr. 574).

Ringstad has never seen the liquid in a toilet compartment agitated by the coupling or impacting of locomotives. (Tr. 611-12).

Ringstad acknowledged that another crew took the locomotive from Algoa to Galveston. He was unaware that some crews have cleaned toilets. (Tr. 614).

John Kennedy – Superintendent of Operations

Kennedy testified that a cab condition claim is not the same thing as a safety complaint. He explained that the cab condition claim is a claim for money whereas a safety complaint is processed in a “completely different manner.” Although managers review cab condition claims, the purpose for the review is not to pass along defects to the mechanical team. Kennedy testified that managers do not necessarily review claims every day. A manager may not see a cab condition claim until a week after an employee enters the ticket. Some cab condition claims are not reviewed at all. (Tr. 633-36).

In 2012, Kennedy became aware through Michael Collins that a significant amount of cab condition claims were being made. Management implemented procedures to inspect locomotives. On November 26, Kennedy inspected Locomotive 4317 at 6pm. He testified that the toilet compartment had no issues, there was no leak, and the floor was not wet. Kennedy ensured that the toilet flushed properly and took photographs of the engine. (Tr. 639-48). He testified that there was no foul odor or chemical smell. Although the floor was clean and dry, the photographs show stains and discolorations on the floor near the drain, in the corner, and in the center of the compartment. (Tr. 650-52).

The next day, Kennedy learned that the Complainants entered cab condition claims based on the condition of the toilet compartment. He determined either that the Complainants had put forward false claims or that the toilet condition had changed significantly. Kennedy contacted the trainmaster in Galveston, Andrew Wooten, and asked him to inspect and photograph the toilet. (Tr. 653-56). Wooten’s photographs depicted a clean toilet area, which appeared to be in the same condition as Kennedy had observed it. Wooten reported to Kennedy by email that the toilet compartment was “spotless,” which Kennedy interpreted as indicating that there were no issues with the floor. (Tr. 659-62). Based on what Kennedy observed in Houston and what Wooten had reported, Kennedy found that an investigation hearing was necessary. (Tr. 665).

Kennedy testified in the investigation hearing that the Complainants had taken the train to Galveston. He stated that he believed that to be true at the time. It was brought to his attention during the hearing that the Complainants had tied down in Algoa. (Tr. 666-67).

Kennedy attended the division central safety meeting in November 2012, which had also been attended by Craig Knight and Stephen Curtright. Kennedy testified that Curtright never said cab condition claims should not be paid and never said that employees should clean bathrooms themselves. (Tr. 669). Kennedy testified that he has attended local chairman meetings but never heard Robert Boemio make the statement attributed to him by Knight. (Tr. 671).

Safety issues may be reported to a yardmaster or trainmaster. En route, the safety issue may be reported to the dispatcher. Beyond that, an employee can report a safety issue to the

safety hotline, to a manager face-to-face, or during a safety team meeting. Kennedy has never submitted a cab condition claim to report a safety issue. (Tr. 673-74).

Kennedy testified that he was not near Curtright or Boemio at all times during the meetings. (Tr. 675-77).

Kennedy does not inspect locomotives as part of his everyday job duties. He is not an inspector or engineer. He testified, “More times than not, I wouldn’t, but there were times I had inspected locomotives with my managers and by myself.” (Tr. 678-79).

Kennedy conceded that the bathroom condition can change over time with the locomotive under power. He agreed that he did not know what the bathroom looked like in Pearland or Algoa, whether chemical had spilled, or whether the bathroom smelled. Kennedy disagreed that the bathroom could have gotten worse in Pearland and then better in Algoa. Although a relief crew brought the train from Algoa to Galveston, Kennedy did not recommend interviewing that crew. Kennedy could have determined who was on the relief crew but did not do so. He testified that he did not “see [the bathroom] situation changing from the time [he] inspected it to the time it got to Galveston.” (Tr. 684-90).

Kennedy testified that he ensures the toilet flushes properly and looks for whether the floor is wet when he performs inspections. He “make[s] sure that it’s a sanitary toilet to use....” He is familiar with the federal definition of sanitary. (Tr. 697-98). Kennedy acknowledged that the floor of the locomotive was stained near or on the drain. He testified that the toilet chemical comes in a gallon jug and could have spilled on the floor to create the stain. (Tr. 700-01). Kennedy did not look up the definition of unsanitary when he began investigating the Complainants. He testified that he began the investigation because the Complainants indicated there was human waste in the compartment. He agreed that the federal definition of unsanitary includes odor, but he did not smell an odor when he inspected the compartment. (Tr. 704-05).

Based on what he observed, Kennedy testified that the chemical would not have spilled over the toilet. He stated that the toilet was working when he inspected it. He acknowledged that two other crews had reported that the toilet needed servicing with the six months prior to the Complainants’ making their cab condition claims. (Tr. 708-10).

Kennedy agreed that the presence of blue chemical on the floor would render the locomotive unsanitary. (Tr. 724).

Andrew Wooten – Manager of Operations Service Excellence

In November 2012, Wooten was a trainmaster in Galveston. As such, he is familiar with locomotives. (Tr. 735).

On November 26, 2012, Kennedy instructed Wooten to inspect the toilet compartment of Locomotive 4317. He did so at 3:00 p.m. Wooten testified that he stood inside the toilet compartment and “[i]t was clean.... [N]othing appeared to be wet.” He saw no human waste or chemical on the walls, floor, or toilet. He did not detect any odor. Wooten testified that there

were some discolorations on the floor. The toilet appeared to be usable. He took photographs on his Blackberry phone. (Tr. 737-39). Kennedy received the photographs and asked Wooten to verify whether chemical was on the floor in the bathroom. Wooten responded that the floor “was completely spotless.” He explained that he was not being literal but meant that the toilet area was clean. (Tr. 744-45).

Wooten initially assumed that the Complainants brought the train to Galveston because that was typical. He was corrected during the investigation/termination hearing and has since learned that John Autry and Paul McGuire brought the train from Algoa to Galveston. Wooten testified that it is “highly unlikely” that the relief crew cleaned the toilet area: “That is not their duty and they don’t have the proper equipment to pump a toilet and clean it.” Wooten stated that he inspected the locomotive about 20-40 minutes after it entered the yard. (Tr. 747-49).

Wooten spoke to the relief crew that took the train from Algoa to Galveston. He did not ask them about the bathroom. He testified, “I didn’t think about it at the time.” (Tr. 761). Wooten does not know whether the relief crew cleaned the bathroom. He testified that based on his “experience as a trainmaster,” crews have always reported unclean conditions. (Tr. 762-63).

Wooten testified that liquid on the toilet compartment floor is not necessarily unsanitary. If the liquid were dried, he would not have an issue. He stated that the liquid could have spilled when it was put in the reservoir. He agreed it was possible that liquid could have drained out of the compartment by the time he saw the bathroom in Galveston. (Tr. 764-65).

The relief crew did not tell Wooten that there had been a problem with the bathroom leaking or having a foul odor. Nor did anyone on the relief crew tell Wooten that the bathroom had been cleaned. Wooten testified that he would have reported an issue to Evan in the Mechanical office. (Tr. 767-69, 771).

#### Stephen Curtright – General Manager

Curtright authorized the investigations against the Complainants when Boemio and Kennedy informed him that they had evidence that abuses had taken place. He was not involved in the investigation but made the decision to dismiss the Complainants. He reviewed the transcripts and exhibits from the formal investigations and the recommendations from Michael Collins and Andrea Smith. Curtright determined that the investigations supported the Complainants’ dismissals. Based upon his 36 years of employment, he did not believe that a relief crew cleaned a toilet compartment that had waste and chemical on the floor. Curtright saw no evidence that chemical had drained through the floor. (Tr. 780-88).

Curtright testified that Complainant Hoot’s injury history did not play any role in the dismissal. He also stated that cab condition claims are not safety complaints but payment requests. Curtright further testified that Hoot’s call to the VTR was a reporting of a mechanical condition that needed servicing at a shop. Not every terminal has such a shop. (Tr. 790-91).

Curtright testified that the Complainants could have reported an unclean toilet over the radio to the dispatcher, trainmaster, or a mechanical officer, and the train would have been

repaired or swapped in Pearland. He stated, “if we had a safety problem..., there’s a lot of ways we can take care of those issues immediately.” (Tr. 791-93).

Curtright denied ever saying that crews should clean bathrooms themselves or that Respondent should not pay cab condition claims. He also denied ever hearing Bob Boemio state that he would fire Complainants just to make a point. (Tr. 794-95). Curtright further denied ever telling Craig Knight that Complainant Hoot would not be reinstated due to his personal injuries. (Tr. 801).

Curtright did not know initially that the Complainants had not taken the train to Galveston. Despite that, he testified that he made an accurate determination. Curtright admitted he did not have evidence of how the bathroom looked or smelled while in Pearland. He also acknowledged that Wooten had made mistakes during the investigation hearing. (Tr. 811-13).

The FRA requires a bathroom to be “clean, sanitary and where a normal person would find it useable.” Curtright agreed that the standard is subjective and could include chemicals on the floor. The term “unsanitary” could also include a foul odor. (Tr. 814-17). Curtright also agreed that a toilet compartment could be unsanitary if liquid from the toilet had gotten on the floor. He identified a stain on the floor from a photograph. Curtright testified that stain indicates that liquid had been on the floor at one time. (Tr. 820-24).

Curtright acknowledged that the toilet compartment on Locomotive 4317 had been reported as non-compliant in April and July 2012 and serviced. (Tr. 824-26).

Michael Collins – Assistant Terminal Supervisor

Collins testified that he never heard Curtright say that Respondent should not pay cab condition claims or that the employees should clean the locomotive bathrooms themselves. (Tr. 836-37).

In 2012, Collins discovered that cab condition claims for the 241 local were being made almost every day. He instructed his team members to begin investigating the claimed issues. (Tr. 838-39).

Collins did not call the relief crew to the investigation hearing because there had been no requests to do so and because there were no allegations that the relief crew had altered the bathroom in any way. He learned during the investigation that there had been a relief crew on the train. The Complainants could have called the relief crew to testify. Collins testified that it would not be reasonable to believe that the relief crew altered the condition of the toilet. He stated, “I had never seen that kind of activity before.” Collins also testified that the relief crew would have been on the train for an hour. (Tr. 846-48).

Collins testified that safety issues are not reported through the VTR, which is a system to create work order logs and tickets. Safety issues should be reported to someone who can address the issues and protect other employees from being exposed to the same hazard. (Tr. 852).

Collins testified that Complainant Hoot reported a non-compliant toilet to the VTR on November 26, 2012 at 12:54 p.m. The generated job ticket indicates that the toilet was serviced on December 1, 2012 at 9:30 p.m. in Belen, New Mexico. Belen is one of Respondent's regular service stations. Collins testified that locomotives regularly get serviced there. Train records show that Locomotive 4317 was driven in and out of the Houston South Yard several times and by seven crews before ending in Belen. No defects were reported. (Tr. 858-63).

Collins reiterated that cab condition claims and VTR reports do not constitute safety complaints. The former relates to a pay claim and is entered on a time ticket, and the latter opens work orders for repairs. (Tr. 870-71).

Collins admitted that he was not with Curtright during the entirety of the safety meetings. (Tr. 872-73).

He testified that an "unsanitary" condition is one that puts an employee's health or safety at risk. The definition of "unsanitary" does not extend to foul odors in the context of cab condition claims. Collins testified that blue chemical on the floor of a toilet compartment could render the compartment unsanitary. (Tr. 888-90).

During the time Locomotive 4317 was used after the Complainants' shift, it is impossible to determine whether the engine was in the lead or had been a trailing unit. Collins testified that the individuals responsible for the daily inspections were required to report defects on the engine in any case. (Tr. 895-96).

Collins testified that a company officer or a local chairman—including the ones representing the Complainants at their investigation hearings—could have determined the identity of the relief crew. (Tr. 901-03).

#### Andrea Smith – Labor Relations

Smith testified that employees make cab condition claims through the electronic timekeeping system. The claim is evaluated and paid if a violation of the collective bargaining agreement has occurred. A claim on a toilet must be objective and verifiable and must have been reported to the VTR. Foul odors are not payable cab condition claims. Smith acknowledged that a foul odor falls within the FRA's definition of unsanitary, but testified that that definition does not apply in cab condition claims. The VTR system opens a work order but is not the method for reporting a safety complaint. If a safety issue renders a locomotive unqualified to lead, an employee should contact a superior and make arrangements to switch the lead. Smith testified that a cab condition claim does not constitute a report of a safety violation or a violation of the FRA. She reiterated that a cab condition claim is a request through the grievance process to pay for a violation of the collective bargaining agreement. (Tr. 921-24).

Smith testified that she reviewed the investigation materials and transcript and determined that the Complainants falsified the cab condition claims. At the time of her determination, Smith understood that a relief crew had taken the train into Galveston. She



testified that, within her experience as a trainmaster, another crew likely would not have cleaned the compartment. (Tr. 926-29).

Employees have access to a manual to determine whether a cab condition qualifies for pay purposes. Smith does not know whether the term “unsanitary” is defined. (Tr. 953-54).

Smith testified that she does not know the identity of the relief crew. She agreed that it would be speculation to say what the crew did or did not do on the train. In her experience, engineers do not clean toilet compartments, but she acknowledged that she does not know what all locomotive engineers do. Engineers are not forbidden from cleaning the toilet compartments. (Tr. 954-56).

Smith testified that she would expect spilled blue chemical to stain the compartment floor, based on her experience. She has seen spilled chemical “a handful” of times. (Tr. 968).

## V. DISCUSSION

### A. Credibility

In weighing the testimony of witnesses, the ALJ as fact finder may consider the relationship of the witnesses to the parties, the witnesses’ interest in the outcome of the proceedings, the witnesses’ demeanor while testifying, the witnesses’ opportunity to observe or acquire knowledge about the subject matter of the witnesses’ testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006).

At the hearing, I have found the Complainants not to be credible witnesses. As credibility bears heavily on determining whether Complainants have acted in good faith, these issues are discussed concurrently below for purposes of explication.

### B. Protected Activity under the FRSA

Congress enacted the FRSA to “promote safety in every area of railroad operations....” 49 U.S.C. § 20101. The FRSA states in pertinent part:

(a) In General.—A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an office or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee’s lawful, good faith act done, or perceived by the employer to have been done or about to be done--

(1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes any violation of any Federal law, rule, or regulation relating to railroad safety or security...

(2) to refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security...

(b) Hazardous Safety or Security Conditions.—

(1) A railroad carrier engaged in interstate or foreign commerce, or an officer or employee of such a railroad carrier, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for—

(A) reporting, in good faith, a hazardous safety or security condition....

49 U.S.C. § 20109(a), (b).

The whistleblower provision incorporates procedures established by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21). 49 U.S.C.A. §42121(b); 49 U.S.C.A. §20109(d)(2)(A); *DeFrancesco v. Union Railroad Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009 (ARB February 29, 2012). Thus, an FRSA complainant must establish by a preponderance of the evidence that: 1) he engaged in protected activity; 2) the employee knew of the protected activity; 3) he suffered an unfavorable personnel action; and 4) the protected activity was a contributing factor in the personnel action.<sup>2</sup> §42121(B)(2)(iii); *Clemmons v. Ameristar Airways Inc., et al.*, ARB No. 05-048, ALJ No. 2004-AIR-11, slip op at 3 (ARB June 29, 2007); *Luder v. Continental Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-009, slip op. at 6-7 (ARB Jan. 31, 2012). If the complainant meets his burden of proof, the employer may avoid liability by proving, through clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of a complainant's protected behavior. §§ 20109(d)(2)(A)(i); 42121(b)(2)(B)(iii)(iv); *DeFrancesco*, ARB No. 10-114, slip op. at 5.

Protected activity may include providing information regarding conduct which the employee *in good faith* believes constitutes a violation of railroad safety or constitutes a hazardous safety condition. 49 U.S.C.A. §20109(a)-(b). Thus, the FRSA does not protect fraudulent or dishonest reports of safety violations. *Walker v. Amer. Airlines*, ARB No. 05-028 AIR (Mar. 30, 2007) (unpub.).

Here, I found Complainants not to be credible witnesses and, as such, find that they did not report any safety violation (or, by extension, make their cab condition claims and VTR report) honestly and in good faith. Kennedy's photographs show the toilet compartment as it was prior to the Complainants' coming aboard. While these photographs show stains in and around the drain and on the left side of the toilet, the compartment was in compliance and sanitary and, presumably, in the same condition in which Complainant Robinson inspected it and found it to be compliant. (CX-34). The photographs taken by Hoot and Wooten also show a clean toilet compartment with no chemical or waste matter on the floor or elsewhere, show no signs of leaking chemical from the toilet itself, and show the compartment to be in an identical condition as Kennedy's photographs. The stains do not appear to be any larger, wetter, or in any way

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<sup>2</sup> This standard has been defined as "superior evidentiary weight." *DeFrancesco*, ARB No. 10-114, slip op. at 5, citing *Brune v. Horizon Air Industr., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13 (ARB Jan. 31, 2006).

changed from one photograph to the next. (CX-27; CX-34; CX-40). While the Complainants indicated on their cab condition claims that human waste and chemical was all over the floor and compartment, nothing in any of the photographs taken either by Hoot or Wooten indicate that this claimed condition actually existed. Even if the liquid drained, as Complainants contend could have occurred, there is no similar drainage on the compartment walls that would explain how waste there could have disappeared. Moreover, Complainant Sims admitted to never actually seeing the inside of the compartment but included on his cab condition claim the same language used by Hoot and Robinson. (CX-36; CX-37; CX-38; Tr. 472-75, 477).

Complainants' testimony is additionally undermined by their collective failure to take the corrective action required by Respondent's handling rules. The rules require that, *inter alia*, an unsanitary lead locomotive to be switched unless doing so is impossible. (RX-E). Robinson testified that he did not seek out this remedy because the locomotive's alleged defect was discovered en route. However, his testimony is undermined by the testimony of John Kennedy and Respondent's rules. Complainants allegedly discovered the defect in Pearland, where they were delayed for several hours. Nonetheless, none of the Complainants contacted the yardmaster or trainmaster and did not take—or even explore—any other corrective action, although Robinson acknowledged that he could have switched the lead locomotive in Pearland during their six-hour wait. (Tr. 112-13; 320-27, 329-32; 333-36).

Furthermore, despite Complainants' contention that the relief crew possibly cleaned the compartment, neither the relief crew nor any of the seven crews responsible for operating or inspecting Locomotive 4317 after Complainants' shift reported any defect or non-compliance or made any safety complaint. Other than alcohol wipes, employees do not have access to cleaning supplies, particularly the kind of supplies required to clean waste all over a toilet floor and compartment. (Tr. 226-30). When the toilet was serviced in December 2012, the service defect indicates "AF INSP REQ." (CX-32). The earlier service records from April and July 2012 show that the toilet had been dirty and non-compliant. (CX-30; CX-31). Together with the photographs, these records undermine the Complainants' testimony. Had the toilet compartment been dirty or non-compliant, the service record would so indicate. Instead, the service performed in December 2012 appears to have been the regularly required maintenance.

However, even if I believed Complainants were truthful on their cab condition claims, I find that making such a claim does not constitute a complaint of a safety violation. Nearly every witness testified that safety complaints and reports cannot be made through cab condition claims. As Robinson testified, the only reason a cab condition claim is made is to request additional pay under the collective bargaining agreements. (Tr. 341). Moreover, employees are not required to make cab condition claims whereas safety issues must be reported through specified means to an individual empowered to address and correct such issues in a timely manner.

Complainant Hoot's report to the VTR system is similar. Submitting a cab condition claim and calling the VTR were both prerequisites to obtaining extra pay. (Tr. 278, 921). Hoot's report to the VTR did not indicate that a safety issue existed. Hoot reported only that the toilet needed service because it was non-compliant, not because it posed a hazardous safety condition. (RX-Y). Furthermore, the VTR system is not overseen by a supervisor. Rather, the system generates a work order addressed when the locomotive reaches the next service station. The VTR

system is not a means through which employees report safety issues. Respondent's empowerment program requires that identified risks be "protected and corrected using the 24/7 Safety Issue Resolution Process. (CX 28). Several witnesses testified that this process includes reporting violations to the safety hotline, a supervisor, the maintenance desk, or a trainmaster, not through the VTR or by means of making a cab condition claim. (Tr. 556-57; 673-74; 790-71; 852, 870-71; 921-24). Hoot furthermore testified that he had submitted cab condition claims several times previously, and if he thought a condition rose to the level of a safety issue, he would take the extra step of reporting the condition to upper management. (Tr. 88-89). He did not take that step here, despite his contention that the toilet compartment presented a safety violation. Hoot and Robinson also testified that their only obligation is to report a hazardous safety condition via the VTR system, which is contrary to Respondent's published policy. (Tr. 167-68; 276-78).

Given the facts above, the record evidence, and the credibility of the witnesses, I find that Complainants did not engage in protected activity. Complainants were dishonest in making their cab condition claims, and such claims—including Hoot's VTR report—do not constitute complaints of safety violations of the FRSA. Because I find that Complainants have not engaged in protected activity, I need not address the remaining elements of their claims.

## **VI. CONCLUSION AND ORDER**

Based upon the foregoing and upon the entire record, Complainants have failed to prove that they engaged in protected activity under the Federal Railway Safety Act. Case Nos. 2013-FRS-00072, 2013-FRS-00073, and 2013-FRS-00074 are hereby **DISMISSED**.

**So ORDERED.**

**LARRY W. PRICE**  
Administrative Law Judge

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**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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov).

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

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

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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

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).