U.S. Department of Labor

Office of Administrative Law Judges
5100 Village Walk, Suite 200

Covington, LA 70433

(985) 809-5173
(985) 893-7351 (Fax)

Issue Date: 02 December 2013

CASE NO.: 2013-FRS-00019

IN THE MATTER OF

DANIEL LEIVA

Complainant[1]

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent

DECISION AND ORDER

A. Procedural History:

This case arises under the "whistleblower" protection provisions of the Federal Railroad Safety Act (FRSA), 49. U.S.C. §§ 20109, (a)(1)(C) and (b) (1)(A) . Sections 20109 (a)(1)(C) and (b) (1) (A) prohibits covered employers from discharging, demoting, suspending, reprimanding , or in any other way discriminating against an employee related to the terms and conditions of his employment for engaging in protected conduct. This conduct includes providing information to covered employers which the employee reasonably believes constitutes violations of federal law, rules or regulations related to railroad safety or security.[2] In this case Complainant alleges that

[1] The transcript cover inadvertently refers to Daniel Leiva as Claimant and Union Pacific Railroad Company as Employer.

[2] 49. U.S.C. § 20109 (a)(1)(C) provides:

> (a) In general.--A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done--
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> (1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security, or gross fraud, waste, or abuse of Federal grants or other public funds intended to

Respondent violated 49 U.S.C.§§ 20109(a)(1(C) and (b)(1)(A) by threating to and removing or suspending him from service because he insisted on and reported to Respondent violent and threatening conduct by conductor, Ronnie J. Frater (Frater) against him on July 14, 2012 . As a result of filing this report Respondent removed him from service resulting in a loss of wages. In addition, on July 27, 2012, Respondent pressured Complainant into signing a waiver of his rights to a hearing by telling him if he did not accept this waiver "negotiated by Respondent with Complainant's union" which provided for, among other sanctions including immediate termination but reinstatement as a probationary employee with loss of pay during his suspension, Respondent, who controlled the hearing, could still terminate and not reinstate him.

Complainant contends that he engaged in protected activity by filing his July 14,2012 report because in so doing he reasonably believed he had reported to Respondent a violation of federal law, rule, or regulation related to railroad safety or security by Frater for which Respondent should not have but did retaliated against him thereby causing him to lose wages and suffer out of pocket expenses, mental anguish, attorney fees, litigation expenses, punitive damages, pre and post judgment interest, and negative information being placed in his personal file.

Complainant filed a timely complaint with OSHA on September 19, 2012. On November 10, 2012, OSHA dismissed the complaint finding no reasonable cause to believe Respondent violated FRSA by disparately treating him from Frater who was likewise removed him from service. Thereafter Complainant filed objections to OSHA's finding and requested a hearing. A formal hearing was held in Houston, Texas on June 24, 2013, during which the parties were afforded the opportunity to present testimony, submit documentary evidence and post hearing briefs.

Complainant submitted 27 exhibits that were admitted during the hearing. (CX 1, 3, 5-24, 27-31).. Respondent submitted 36 exhibits that were admitted during the hearing.(RX-A to JJ). The parties submitted post trial briefs. In its brief Respondent contended that its Motion for Summary Disposition had not been rule upon and was still pending. Respondent's motion had

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> be used for railroad safety or security, if the information or assistance is provided to or an investigation stemming from the provided information is conducted by—
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> (C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct;

49. U.S.C. § 20109 (b) (1)(A) provides in pertinent part:

> (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

not been ruled on prior to the hearing because of its last minute submission which precluded a full consideration of the arguments raised by Respondent and Complainant in opposition thereto.

Having had more time to consider this motion I find that there are genuine issues of material fact relative to Claimant's activities and Respondent's motivation in suspending Complainant which even if the undersigned could resolve in Respondent's favor would not result in a decision as a matter of law in support of Respondent's motion and thus deny it.

B. **Stipulated Facts:**

1. Respondent is a railroad carrier within the meaning of FRSA , 49 U.S.C. 20109.

2. Respondent is in the business of line-haul freight operations throughout the United States and therefore is engaged in interstate commerce within the meaning of FRSA.

3. Complainant was employed by Respondent as a locomotive engineer and was assigned to Respondent's train, engine and yard department. As such Complainant is an employee covered under FRSA.

4. On or about July 14, 2012, Complainant was working as an engineer at or near Refugio, Texas, near milepost 186 on the Brownsville Division.

5. Complainant and R.J. Frater (Frater) were both taken out of service pending an investigation set for August 1, 2012, to determine if one or both employees had violated Respondent's General Operating Rule (GCOR) 1.6 and its prohibition against being argumentative and quarrelsome.

6. Both Complainant and Frater waived their right to an investigative hearing and chose to accept reduced discipline on a leniency basis, executing a formal waiver on July 27, 2012.

7. On November 10, 2012, the Secretary of Labor issued findings that Complainant demonstrated no evidence that Complainant engaged in protected activity or that Complainant received any disparate treatment and dismissed the complaint.

8. Complainant timely requested *de novo* review before an Administrative Law Judge.

C. Issues:

1. Whether Complainant, in reporting Frater's verbal confrontation to his supervisor on July 14, 2012 constituted conduct protected by FRSA; and

2. If so, whether Complainant's protected activity was a contributing factor in any adverse employment action;

3. Whether Respondent would have taken the same adverse employment action in the absence of Complainant's protected activity;

4. Whether Complainant suffered any damages as a result of Respondent's adverse action.

D. Hearing Testimony

Testifying live at the hearing were Complainant, Jeremy Lorance, James Carter, Jason Jenkins and Michael Phillips.[3] Complainant is a male employee of Respondent with a wife and three dependent children. He has been employed by Respondent since March 15, 2004 during which he worked as a breakman, switchman/conductor for 7 years, and engineer since March, 2011 (Tr. 8,9).

As an employee of Respondent Complainant received on the job training and classroom instruction in Respondent's rules which are subject to the Federal Railroad Administration (FRA) regulations. Respondent instructed Complainant to work in compliance with FRA regulations by following Respondent's code of operating rules referred to as GCOR 6th Edition. April 7th, 2010. (CX-9; Tr. 10). Besides GCOR Respondent has other rule books Complainant is expected to follow including safety, air breaks and Hazmat. (Tr. 11).

Complainant testified on July 14, 2012, he reported to Respondent's facility in Bloomington, Texas where as engineer he was assigned to work with conductor Frater on a train destined for Refugio, Texas. Complainant had never worked with Frater before and was not familiar with Refugio. After meeting the incoming crew and being debriefed by incoming engineer, Tyler Gray, per Respondent's rules, Complainant proceeded to Refugio. Upon arriving in Refugio, Complainant explained to Frater his debriefing by Tyler whereupon Frater became belligerent yelling at and pointing his fingers almost in Complainant's face. Complainant told Frater to back off which Frater did. Complainant and Frater secured the train after which Complainant told Frater it was not necessary to react the way he did. Frater responded by pointing his fingers again at Complainant's face whereupon Complainant left the engine compartment by a back door, and went into the second engine cab and locked the door. From there he called Gray was but not able to reach him whereupon Complainant called Mr. Corona (Corona), yard manager in Bloomington, told him what Frater had done and asked to be relieved from continuing the trip to Kingsville, Texas because he did not feel safe working with Frater. In turn, Corona told Complainant to call Mr. Lorance, manager of operations in Bloomington. (Tr.12-17,23).

Complainant called Lorance, and told him what had occurred with Frater. In response Lorance said: "Why don't you guys work it out and go back to work." Complainant replied: "I don't believe that I could work things out with the conductor. I insist on going back to Bloomington so I can fill out a report and you can talk to him". Lorance told Complainant that if he insisted on coming to Bloomington he would have to pull both out of service. Complainant replied that he still wanted to come to Bloomington to fill out a report because he did not feel

[3] Complainant and Respondent also submitted in whole or part the pre-hearing depositions of Complainant, Lorance, Carter, Jenkins, Albert Galvan, and Charles Piland as CX-3,5,,6-8 RX-Z ro RX-EE

safe with Frater. In turn Respondent sent a limo that took both Complainant and Frater back to Bloomington where he met with Lorance and filled out a 705 report on the incident as did Frater whereupon both men were pulled out of service or suspended without pay. (Tr. 24-26).[4]

While in Bloomington, Complainant spoke to Jason Jenkins, (Jenkins), Lorance's supervisor, saying he was only doing his job in the reporting the incident to which Jenkins replied he already knew about the case and that Complainant did the right thing whereupon Complainant asked why he was being pulled out of service to which Jason replied there were certain protocols Respondent followed. But Complainant had nothing to worry about. (Tr. 27).

Complainant testified that he believed Frater's violent outburst violated Respondent's Rule 1.6. dealing with quarrelsome employee conduct which he believed he had to report and read as follows:

> Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employee is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated. (CX-9, page ; Tr. 18)

Complainant also believed Frater's conduct violated Respondent's Rule 1.7 dealing with altercations; Rule 1.1.3 dealing with accidents, injuries and defects and Rule 1.4 dealing with reporting of conditions that could threaten train, passenger or employee safety. Those rules read as follows:

> Rule 1.7 "Employees must not enter into altercations with each other, play practical jokes, or wrestle while on duty or railroad property. (CX-9, page 4; (Tr.19);

[4] Complainant's 705 report is 4 hand written pages report which he filled out on July 14, 2012 at 10:45 am and described being called for duty at Bloomington, Texas at 3:45 am. At 6:00am, Complainant and Frater swapped crews at Victoria whereupon Complainant had a job briefing from the engineer he replaced (Taylor Gray) who told him what to do upon delivery of the train in Refugio, Texas. At about 8:00 am Complainant arrived in Refugio, stopped the train, and had a job briefing with Frater in which he relayed what Gray had told him. In response Frater became very agitated, raised voice and told Complainant he did not care what Gray said because he was going to run the train his way since it was his job and exited the engine. After securing the train Frater came back to the engine whereupon Complainant told Frater it was not necessary to raise his voice and become aggressive whereupon Frater started to scream , pointing his finger at Complainant face, saying it was his job and he did not care what Complainant had to say and repeated Complainant did not know who he was dealing with. Complainant asked Frater to step back which he did and then Complainant exited the engine through a back door and entered the rear engine where he contacted Ivan Corona, told him what had happened and then reached MOP, Lorance who asked Complainant to try to resolve the dispute with Frater or go back to Bloomington and be pulled out of service.. CX-21.. Frater's statement given on the same day at 8::26 am admits telling Complainant that Gray did not run the job whereupon Complainant accused him of invading his space, raising his voice and repeatedly called him a "mother F….'. (CX-20).

> Rule 1.1.3 "Report by the first means of communications any accidents; personal injuries; defects in tracks, bridges, or signals; or any unusual condition that may affect the safe and efficient operation of the railroad. Where required furnish a written report promptly after reporting the incident."(CX-9, page 1; Tr. 20);
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> Rule 1.4 "Employees must cooperate and assist in carrying out the rules and instructions. They must promptly report any violations to the proper supervisor. They must also report any condition or practice that may threaten the safety of trains, passengers, or employees, and any misconduct or negligence that may affect the interest of the railroad." (CX-9, page 3;Tr.21).

Complainant testified that he regarded the level of communication between him and his conductor to be very important and essential to the safe operation of a train. (Tr. 21). Further in this case he did not feel he could adequately communicate with Frater for the safe operation of the train. (Tr. 22).Further if he failed to follow these rules he could be terminated because that would put the public at risk.

Thereafter, Lorance sent both Complainant and Frater a letter dated July 24, 2012 informing both men to report to Respondent's office in Bloomington for a formal investigation on August 1, 2012 and hearing to develop the facts and determine responsibility with the proposed discipline being a level 5 offense (termination) with each man being suspended pending a result of the investigation. (CX-13, RX-C,D). The presiding officials were Respondent's officials. (CX-13; RX-C; Tr. 28-30).

Respondent next contacted Complainant and Frater telling them to report to Spring, Texas on July 27, 2012 where they met with Jenkins and union official, Charles Piland. There Frater apologized to Respondent and Complainant followed by a meeting with union representatives after which Respondent proposed that Complainant sign a hearing waiver thereby agreeing to (1) termination of his employment followed by immediate reinstatement as a probationary employee with vacation and seniority rights unimpaired but without pay for time lost, (2) dismissal of Complainant's claims, (3) agreeing not to engage in "such conduct" in the future or face disciplinary action and (4) attend safety intervention and workplace violence training or face a formal hearing where he might be terminated. (CX-30; RX-G; H; Tr. 32-35).

In agreeing to sign and accept the waiver Complainant knew Respondent would be ruling on admissibility of evidence, objections, and ultimately determine who if anyone violated Respondent's rules and the appropriate penalty if be imposed. Further, Complainant could be represented by union local chairman but not an attorney. (CX-34;Tr. 36). Complainant agreed to sign the waiver because he had to support his family and had already lost pay from July 15 to

July 27, 2012. (Tr. 39). In addition Complainant was not placed on the extra board which meant a loss of $4000.00 plus a one day bonus of $250.00, even though he was available to work every day in July. 2012 (CX-33; Tr. 45-48). Further he loss two days pay because he had to take that time off to participate in this proceeding which amounted to $650.00, plus 2 day of travel from Beaumont to Houston and return and hotel expenses of $109.00 (Tr. 48-51

Respondent later advised him that his waiver would be part of his work record, i.e. that he had engaged in work place violence which he had not done and after looking at a video on workplace violence asked Jenkins, " What the video says—wasn't it exactly what I did" to which Jenkins replied, "Mr. Leiva, you had all of the takes"(Tr. 36-38, 40).

In an effort to clear his name, Complainant then called Respondent's Beaumont's manager who referred him to Lance M. Fritz(Friz), Respondent's Executive Vice President, who was behind Respondent's "The Courage Pledge" wherein employees agree to shield themselves and their team from harm by "fixing an unsafe situation, addressing unsafe behavior, or stopping the line." (CX-22, Tr.42,43). In turn Fritz referred him to Respondent's superintendent of Houston Service Unit, Tom Lisher, who was already involved in Complainant's case and then Greg Workman, Respondent's Southern Region Vice President who did nothing for him. (Tr. 33-46))

On cross, Complainant admitted that Frater as the conductor was in charge of the train and he was required to follow his instructions but denied trying to "reingage him" after the initial incident passed. Rather he was merely trying to establish good communication between him and Frater for the safety of the train and crew. (Tr. 52-55). Complainant testified that he felt intimidated by Frater approaching him, pointing his fingers in his face, using profanity and repeatedly telling Complainant he did not know who he was messing with. (Tr. 69, 70). In essence Frater resented being told by Complainant what he was doing to do because Frater as conductor was in charge and resented being told anything by Complainant. (Tr. 76). Further at no point from the argument until Frater filled out a report of the incident (Form 705) in Bloomington on July 14, 2012 did Respondent take Frater's statement and that the only reason for taking out of service was Complainant insisting on filling out of a report of the incident.(Tr. 76-80).

Complainant's second witness, Jeremy Lorance (Lorance), manager of operating practices for Respondent (MOP) testified he received a call from Ivan Corona, (Corona) manager of yard operations (MYO) in Bloomington on July 14, 2012 telling him of a problem in Refugio, Texas between Complainant and Frater about which Complainant was going to call him. Shortly thereafter Complainant called and told him he had been threatened by Frater (Tr. 84, 85). Lorance testified Frater was a large person over 6 feet tall and weighs between 200 to 300 pounds, substantially bigger than Complainant. (Tr. 86). After receiving Complainant's call, Lorance called Jimmy Carter, Senior MOP, told him what had occurred to which Carter said that

if the crew came back to Bloomington to pull them out of service whereupon Lorance called Complainant and told him what Carter said. (Tr. 86-89). Further Lorance admitted that if both men had simply returned to work Complainant would not have been pulled out of service (Tr. 89).[5]

Lorance testified that before his arrival in Bloomington, no one other than Complainant had provided him with any information about Frater's conduct which Lorance considered to be a safety issue. (Tr. 90). Of Respondent's rule books, the General Code of Operating Rules (GCOR) dealing with safety is of principle or paramount importance. (Tr, 91). Respondent expects employees to follow these rules and to communicate effectively. After collecting Complainant and Frater statements, Lorance pulled Complainant and Frater out of service in accord with his policy of pulling both the aggressor and victim out of service, and charged Complainant with work place violence (Tr.95-100).

James Carter, Senior Manager of Operating Practices, who has at times supervised all managers of operating practices in Respondent's Houston Unit and has filled in for Mr. Jenkins, Director of Operations when absent, admitted receiving a phone call from Lorance on July 14, 2012 informing him that Complainant wanted to report the incident with Frater whereupon Carter told him to pull both Complainant and Frater out of service if both men did not report for work. (Tr. 102-03). Further he had received whistleblower training and nothing in that training would persuade him to act differently because he did not consider the incident to involve safety but rather workplace violence. (Tr. 104).

Jason Jenkins, Respondent's Director of Operations or Safety Director for the Houston Service Unit (DRG), which included the Bloomington, Refugio, and Kingsville, Texas areas, testified he was informed on July 14, 2012 of the Complainant/Frater incident by Lorance. (Tr.108). Lorance told Jenkins that Complainant initially informed him of the argument and complained he felt threatened by Frater. Further Jenkins only source of information at that time was Lorance and he (Jenkins) had no reason to doubt Complainant good faith in reporting the incident.(Tr. 110).

In this situation involving work place violence with a potential Level 5 offense involving termination, Jenkins testified Respondent follows a formal process wherein both men are pulled out of service and called into Respondent's offices where the individuals involved are allowed union representation and then go to a formal hearing with a superintendent from the same area or another area making the final decision. The decision of whether to go through this process

[5] Carter confirmed Lorance's testmony of their conversation. (Tr.102,03) Carter like Lorance knew his whistleblower training that it was not permissible to attempt to dissuade employees from reporting a safety problem or condition. (Tr. 104). Further Union Representative and Local representative , Charles Piland testified by deposition that Frater was a large , excitable man whom he has seen on occasion become physically intimidating (CX-10).

however is left to complaining individual if he wants to proceed with and file the charge, (Tr. 116). Both men could have resolved the situation and gone back to work, in which case neither men would have been pulled from service, In this case after he filled out his 705 complaint form in Bloomington, Complainant was pulled out of service.(Tr, 119).

Jenkins testified he spoke with Complainant on the phone in the early afternoon of July 24, 2012, and told him he did the right thing by reporting the incident and not Frater. (Tr. 120) Jenkins could not recall telling Complainant being pulled out of service was just part of the process and that he did not have anything to worry about. (Tr, 121). In determining what type of waivers to give Complainant, Jenkins talked with Superintendent Lisher, the presiding officer, and they determined the appropriate waiver. (Tr. 124).

Jenkins testified as part of his duties as Director of Safety he has taught both engineers and conductors on safety not by giving out copies of 49 CFR, Part 200, but providing them with Respondent's rules, telling them that if they comply with Respondent's rule they will be "OK" with the CFR because Respondent's rules are more stringent than the regulations. (Tr. 127). Further Jenkins knew it was impermissible to do anything to dissuade employees from reporting a safety condition. (Tr.127, 128).

Michael Phillips, (Phillips), Respondent's General Director of Labor Relations, testified about Respondent's disciplinary process as negotiated with the BLET representing the engineers which provides that before discipline can be imposed on a employee (engineer) there has to be a fair and impartial investigation, notice of the investigation, transcription of the investigation after which if it is determined that the evidence supports the charge then timely issuance of discipline notice and a claims procedure. (Tr. 135). An employee is allowed an "impartial hearing" where an employee is allowed to defend himself, have the hearing transcribed, present witnesses and be defended by his union representative after which the evidence is reviewed and a decision issued within 10 days followed by the aggrieved employee if any being allowed to file a grievance which can be taken to arbitration. (Tr. 136-41).

On cross, Phillips admitted that the ARB has decided that election of remedies under a collective bargaining agreement is not an election of remedies under the Act and that Complainant's hearing as provided by Respondent is one where the presiding official is a company official who determines admissibility of evidence, rules on objections, with no specific rules of evidence, with appeals to the National Mediation taking up to 18 months. (Tr. 141, 146-148). Further in Complainant's case Phillips admitted Respondent was not required to pull Complainant out of service to file his complainant against Frater but could elect to do so under its system agreement discipline rule. In like manner it was not obligated under its union agreements to charge Frater with a dismissal infraction. (Tr. 159-60).

E. Discussion, Conclusion and Order

In whistleblower cases under the FRSA a complainant such as Leiva must establish by a preponderance of evidence that (1) he engaged in protected activity as defined by the FRSA; (2) he suffered an adverse or unfavorable personnel action; (3) the protected activity was a contributing factor in whole or part for the adverse or unfavorable personnel action. Even if complainant meets this burden of proof the employer may nevertheless avoid liability if it can show by clear and convincing evidence that it would have taken the same adverse or unfavorable personnel action in the absence of complainant's protected activity. *Hamilton v. CSX Transportation, Inc.* ARB No.12-022 (ARB, April 30, 2013).[6] In addition Complainant must establish by a preponderance of evidence that Respondent is subject to the Act and complaint is a covered employee under the FRSA. (*Rudolph v. National Railroad Passenger Corporation (AMTRAK),* ARB No. 11-037, ALJ No. 2009-FRS-015, slip op. at 11 (ARB March 29, 2013). In this case the parties stipulated to Respondent and Complaint's coverage under the FRSA

Complainant argues protected activity under section 20109 (a)(1) (C) does not require a report of conduct that is an actual violation of federal law or regulation but rather a reasonable belief by the employee that the conduct reported constitutes a violation of federal law, rule or regulation related to railroad safety or security. This condition is met by (1) Respondent incorporating federal safety and security laws into its rule books including the GCOR; (2) the Federal Railway Administration(FRA) requiring railroads such as Respondent (a) to file its operating rules including the GCOR with it. [49.C.F.R. 217.7] (b) periodically test their employees on compliance with GCOR [49.C.F.R. 217.9] and (c) and certify its engineers and conductors are knowledgeable of and operating in compliance with GCOR [49 C.F.R. 240.117, 240.209, 240.211, 242.121. 242.123, and Respondent's action in teaching Complainant that compliance with GCOR and its other rule books ensured compliance with federal law and regulations. (Tr.9, 20, 124-27).

Further under section 20109 (b)(1) (A) an employee need only make a good faith report of a hazardous safety and security condition to be protected under the FRSA. In this case supervisor, Lorance admitted Complainant's conduct involved a safety issue (Tr. 90; *See also* CX-7, p.7; Tr.14-17) Moreover, Supervisor Jenkins admitted he had no reason to doubt Complainant's good faith in reporting the incident (Tr. 27, 110, 111; CX-8, p.6)

Complainant argues adverse action because Respondent held him out of service until he was forced to take a hearing waiver and threatened him with termination while noticing him for a formal hearing. Such action is clearly adverse action prohibited by the FRSA. Indeed the mere act of threatening discipline is itself adverse employment action

[6] Actions brought under the FRSA are governed by the burdens of proof set forth in the employee provisions of the Wendel l H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21). *See* 49 U.S.C. §

prohibited by the FRSA. *See Vernace v. Port Auth. Trans-Hudson Corp.*, ARB No. 12-003 (ARB Dec. 21, 2012).

As for the third element, contributing factor, Complainant notes that the ARB defined it as follows:

> A contributing factor includes any factor which alone or in connection with other factors, tends to affect in any way the outcome of the decision. The contributing factor element of a complaint may be established by direct evidence or indirectly by circumstantial evidence. Circumstantial evidence may include temporal proximity, indications of pretext….[and] antagonism or hostility toward a complainant's protected activity….

DeFrancesco v. Union Railroad Co., ARB. No. 10-114 at pp. 6-7 (Feb. 29, 2012). This element or standard does not require Complainant to prove retaliatory motive or animus.

Complainant asserts that Respondent's management told him when he reported Frater's conduct that he should go back to work (Tr. 23-26, 88-89, 103). Further they told Complainant that if he did not get back to work and insisted on returning to Bloomington to fill out a formal written report on Frater he would be pulled out of service. Management which included Lorance, Jenkins, and Carter made the preceding statement to Complainant based solely upon information provided from Complainant. (Tr. 86,87, 102, 110). Frater never called management to report the incident. Respondent cannot prove by clear and convincing evidence that it would have taken the same adverse action in the absence of his protected activity because Lorance admitted that had Complainant gone back to work rather than insisting on coming to Bloomington to file a formal complaint he would not have been pulled out of service. (Tr. 89, *see also* Tr. 103)

Finally Complainant argues that when he signed a hearing waiver pursuant to a collective bargaining agreement he did not forgo his right to the instant proceeding because the railroad grievance process under a collection bargaining agreement does not constitute an election of remedies under section 20109(f) and does not prevent from proceeding under the FRSA. *Mercier v. Union Pacific R.R. Co.,* ARB No. 09-121;

On the other hand Respondent contends Complainant admitted he was not familiar with FRSA and had not been provided the code of federal regulations in training and thus he could not reasonably believed he was reporting a violation of federal law when he reported the Frater incident. Further Complainant admitted actively re-engaging and escalating the fight when Frater returned to the engine and Complainant told him it was not necessary for Frater to react the way he did. It was only after the so called reengagement that both men reported the incident to their supervisors. In pulling Complainant out of service pending an investigation of the incident, Respondent was not retaliating against Complainant but merely addressing an incident that was a two sided affair wherein both men exhibited poor judgment and heated tempers.

Further Responded never forced Complainant to accept a waiver. In so doing Complainant waived his right to pursue any action under Section 20109. Indeed, the hearing process is designed to protect employees from wanton imposition of discipline by Respondent.

Respondent argues that protected activity involves two elements: (1) the information Complainant provides must involve a purported violation of a regulation, order or standard related to safety even though the Complainant need not prove an action violation and (2) Complainant subjective belief must be objectively reasonable. Reporting work place violence is not protected activity under 2019 (a) (1) (c)(and Complainant's decision to "re engage" Frater, shows he had no objective reasonable belief that by so doing he was reporting in good faith hazardous safety or security condition as required under Section 20109(b)(1)(A). Further assuming Complainant's conduct was protected, Respondent argues it would have imposed the same discipline on Complainant even if he had not reported the incident because Respondent would still have been obligated to investigate Frater's report. Finally Respondent argues If FRSA protected reporting workplace scuffles then any bully could pick a fight and then report it to a supervisor with full confidence that he had FRSA protection.

Having considered both positions I find no credible testimony to support Respondent's position that Complainant tried to reengage Frater in a work place argument and thus was equally responsible for the dispute and had no objective and reasonable belief that in so doing he was reporting a hazardous safety or security condition. Further I find no support for Respondent's proposition that reporting work place violence is not protected activity under the FRSA or that Complainant is not citing a definite C.F.R safety provision was tantamount to an admission he did not subjectively or objectively believe his conduct in reporting the Frater incident was not a violation of and 2) in reporting such conduct Complainant was suspended from service without pay and thus suffered an adverse personal action which prompted him to sign a waiver of his right to a company hearing leading to additional adverse personnel action of termination and reinstatement as a probationary which was placed in his personal record and subjected him to future termination if he engaged in similar conduct in the future and (3) the action of reporting the Frater confrontation was thus a contributing factor in this adverse personnel action.

I also find that Respondent has not proven by clear and convincing evidence that it would have subjected Complainant to similar adverse personnel action because Respondent told him that if he did not insist on filing a report about the Frater confrontation but instead "worked the problem out with Frater" then he would not have been suspended. This is simply not an argument between two men which Employer investiqated, found both men responsible and imposed similar punishment. Rather it involves an argument started by Frater which Complainant could not resolve, affecting train safety which when Complainant reported was told by Respondent before any investigation that if he failed to resolve would result in his suspension.

Accordingly I find Respondent liable for violating the FRSA as alleged, namely Sections 20109 (a)(1) (C) and (b) (1)(A) and order Respondent to pay Complainant the following:

1. Backpay/or lost wages from July 15, 2012 to July27, 2012 in the amount of $4,250.00 plus $650.00 for two days of lost wages to attend his deposition and the hearing. [7]

2 Travel expenses of $169.50 for 300 miles of travel in private vehicle to deposition and hearing at the GSA rate ‘of 56.5 cents per mile. [8]

3. Hotel expenses for one day to attend hearing

4. Nominal damages of $5,000 for mental anguish caused by specter of losing job from July 14-July 27, 2012 and increased discipline for one year beginning July 27, 2012.[9]

5. Expunge from Claimant’s personnel record all disciplinary references relating to Complainant’s suspension and waiver

6. Complainant shall have 30 days to submit a fully supported application for attorney fees and litigation expenses with sup[illegible]cumentation for any pre and post interest payments on awards to Complainant.

SO ORDERED this 2nd day of Dece[illegible]3, at Covington, Louisiana.

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

CLEMENT J. KENNINGTON

Administrative Law Judge

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

[7] Tr. 46-49
[8] Tr. 51
[9] Tr. 30-32, 39-43

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

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

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

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

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

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