U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)

Issue Date: 18 February 2016

CASE NO.: 2013-FRS-00021

In the Matter of:

CHARLES RAULERSON,

Complainant,

v.

CSX TRANSPORTATION, INC.,

Respondent.

APPEARANCES: Stephen J. Fitzgerald, Esq.
Attorney for the Complainant

Jacqueline M. Holmes, Esq.
Thomas M. Chiavetta, Esq.
Attorneys for the Respondent

BEFORE: ALAN L. BERGSTROM
Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

This matter arises from a complaint filed under the employee protection provisions of the Federal Railroad Safety Act, U.S. Code, Title 49, §20109, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53 ("FRSA" or the "Act") and implementing regulations at 29 CFR, Part 1982 (the "Regulations").

The FRSA complaint filed December 6, 2011, with OSHA alleged that the Respondent discriminated and retaliated against him in response to activity he alleged constituted protected activity. The complaint was referred to the Office of Administrative Law Judges (OALJ) for formal hearing upon appeal by Complainant of the November 6, 2012, Occupational Safety and Health Administration (OSHA) determination dismissing the complaint. The Secretary, acting through the Regional Administrator for OSHA, reviewed an arbitrator's decision dated March 30, 2012, and found that the arbitration proceedings "dealt adequately with all factual issues

raised in the above referenced complaint and that the proceedings were neither palpably wrong nor repugnant to the purpose and policy of the Act." The Secretary deferred to the arbitrator's decision and dismissed the compliant. On December 3, 2012, the Complainant filed a request for a *de novo* hearing before the OALJ.

A hearing was held before the undersigned presiding Judge in Newport News, Virginia, September 3-4, 2014. The decision in this matter is based upon the Parties' arguments both at the hearing and in post-hearing briefs and motions and all documentary evidence admitted into evidence at the hearing. The documentary evidence admitted at the hearing includes ALJX[1] 1-14,[2] CX 1-27, and EX 1-32, 36-42, and 44-61.[3]

STIPULATIONS

The parties made the following stipulations and this presiding Judge accepted the stipulations as fact in this case (TR 7-10):

1. At all times relevant to this proceeding, the Respondent was a railroad carrier engaged in interstate commerce within the meaning of the Railroad Safety Act as amended.
2. The Complainant was hired by the Respondent on February 21, 2005, as a conductor.
3. While employed by the Respondent, the Complainant was an employee of Respondent within the meaning of the Federal Railroad Safety Act, as amended, and its implementing regulations.
4. On June 5, 2011, the Complainant was performing assigned work coupling cars on Track B46 in Respondent's Rice Yard in Waycross, Georgia.[4]
5. On June 17, 2011, the Complainant was charged with a major violation of CSX operating rule GR-2 based on his interaction with Respondent's Trainmaster T. Thornton on June 11, 2011.
6. On July 6, 2011, a hearing pursuant to the collective bargaining agreement was held before CSX Trainmaster Brad Cooper on the alleged CSX operating rule GR-2 violation by the Complainant.
7. Upon the decision of Jacksonville Division Manager D. Jones, the Complainant's employment was terminated by Respondent on August 3, 2011.
8. The Complainant appealed the termination of employment based on violation of CSX operating rule GR-2 under the consolidated Region Agreement between Respondent and United Transportation Union collective bargaining agreement then in effect.
9. The appeal of the Complainant's termination of employment under the terms of the collective bargaining agreement was denied on May 30, 2012.
10. The Complainant earned $35,884.58 gross from the Respondent in 2010, which included a 45 calendar day suspension period and earned $30,319.00 gross from the Respondent in

[1] The following notations apply in this Decision and Order: ALJX- Administrative Law Judge Exhibit, CX- Complainant's Exhibit, RX- Respondent's Exhibit, TR- Transcript, CB- Complainant's Brief, RB- Respondent's Brief.
[2] ALJX 13 and ALJX 14 were admitted into evidence during the hearing. The Respondent's Motion to Exclude Testimony (ALJX 13) was granted. (TR at 385- 388).
[3] The remaining Respondent's exhibits that were not accepted into evidence were attached to the record for review purposes.
[4] June 5, 2011 is the date the Complainant began his night shift work. The actual sideswipe incident involved occurred at the end of Complainant's shift at approximately 5:30 AM, June 6, 2011. For clarity purposes, the shift date of June 5, 2011 is used for the event underlying the FRSA complaint.

2011 from January 1 through June 5, 2011.

ISSUES

The following issues remain to be adjudicated in this case (TR 10-14):

1. Did the Complainant engage in activity protected under the FRSA on June 11, 2011, by reporting unsafe conditions in the Waycross Rail Yard involving freight cars coming out of the bowl towards the hump, the lack of retarders on the east end of the track where freight cars are coming into the bowl; insufficient lighting in the area; and no yellow cross ties to let employees know where the tracks end, as alleged in the complaint (ALJX 7)?[5]
2. If so, did the Respondent have knowledge of the protected activity as alleged in the complaint?
3. Did the Complainant suffer an adverse employment action of suspension on June 15, 2011, and/or termination of employment on August 3, 2011, as alleged?
4. Was the protected activity alleged in the complaint a contributing factor to the decision which caused the adverse employment action?
5. If yes to all the above, has the Respondent established by clear and convincing evidence that it would have taken the same adverse employment action in the absence of the protected activity?
6. Is the Complainant entitled to appropriate relief under the FRSA such as reinstatement, back pay, front pay, restoration of employment benefits and seniority, interest, attorney's fees, and legal costs?

DECISIONAL FRAMEWORK

Section 20109(b)(1) of the FRSA and 29 C.F.R. § 1982.102(b)(2), prohibit a railroad carrier, or employee of a railroad carrier from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee because he: (a) reported in good faith a hazardous safety or security condition; (b) refused to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties, provided the refusal was made in good faith and no reasonable alternative to refusal was available, and a reasonable person in the circumstances would then confronting the employee would conclude that the hazardous condition presented an imminent danger of death or serious injury, and the urgency of the situation did not allow sufficient time to eliminate the danger without refusal, and the employee, where possible, notified the railroad carrier of the existence of the hazardous condition and his intention not to perform further work, or not authorize the use of the hazardous equipment, track, or structures are repaired properly or replaced; or (c) refused to authorize the use of any safety-related equipment, track, or structures if the employee believes they are in a hazardous safety or security condition, subject to the same qualifying provisions listed in (b).

[5] After the Complainant's case in chief was completed, this presiding Judge found that there was insufficient evidence to show that the Complainant reported hazardous safety conditions relating to the lack of retarders, yellow cross ties, and insufficient lighting in the area, and thus the Complainant could not have engaged in protected activity with respect to these conditions. (TR at 262; Complainant's testimony at TR 129 describing which paragraphs of the OSHA complaint constitute his allegations of protected activity.).

The FRSA whistleblower provision incorporates the administrative procedures found in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. §42121. *See* §20109(d)(2)(A)(i). Therefore, complaints under the FRSA are analyzed under the legal burdens of proof as outlined in the AIR 21. *Powers v. Union Pacific Railroad Co.*, ARB Case No. 13-034, 2015 WL 1876029 (ARB Mar. 20, 2015) *reissue* (Apr. 21, 2015); *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013). The burden shifting framework set forth in AIR 21 requires a complainant to prove by a preponderance of the evidence that: (1) the complainant engaged in protected activity; (2) the employer knew of the protected activity; (3) the complainant suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *Powers*, id. *9, FN 2; *Aurajo*, 708 F.3d at 157; *see also Consolitated Rail Corp. v. U.S. Dept. of Labor*, 567 Fed. App'x 334, 337 (6th Cir. 2014); *Murphy v. Norfolk Southern Ry. Co.*, No. 1:13-CV0863, 2015 WL 91422 (S.D. Ohio Mar. 3, 2015). A determination that a violation has occurred may be made only if the complainant has demonstrated by a preponderance of the evidence that protected activity was a "contributing factor" in the adverse action alleged in the complaint. 29 U.S.C. §1982.109(a). "A 'contributing factor' is 'any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.'" *Powers*, id *9

If a complainant proves that his protected activity contributed to the adverse action, the employer may avoid liability if it "demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of [the protected activity.]" 49 U.S.C. §§42121(b)(2)(B)(iv), 20109(d)(2)(A)(i); *see also* 29 C.F.R. §1982.104. If the employer does so, no relief may be awarded to the complainant. 42 U.S.C. §42121(b)(2)(B)(iv). "Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probably or reasonably certain.'" *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-00052, slip op. at 5 (ARB Jan. 31, 2011) (*quoting Brune v. Horizon Air Indus.*, ARB No. 04-037, ALJ No. 2002-AIR-00008, slip op. at 14 (ARB Jan. 31, 2006)).

PARTIES' POSITIONS

Complainant's Position

The Complainant argues that he engaged in protected activity during his June 11, 2011, conversation with T. Thornton when he made a report of hazardous safety conditions in the bowl, expressed a refusal to work in unsafe conditions in the bowl, and stated an intent to contact a lawyer to request an FRSA safety investigation. The Complainant referred to Trainmaster Thornton's e-mail, at CX 4, written later the same day arguing that his version of events is "almost entirely corroborated by Trainmaster Thornton." (CB at 23). The Complainant notes that in that e-mail, T. Thornton confirms the Complainant's statements that "he would walk every track," that he would "call a lawyer," that he "could have been killed during the incident," etc. The Complainant notes T. Thornton's testimony that she agreed that this June 11, 2011, conversation was a report about a hazardous safety condition in the yard and that the Complainant was raising safety issues.

The Complainant argues that there are no factual disputes regarding what the Complainant said to T. Thornton and that therefore the Respondent can only argue that the Complainant's

conversation with T. Thornton did not constitute protected activity. The Complainant argues that his conversation with T. Thornton did constitute protected activity because the contents of the conversation fit the plain meaning of the Act regarding "reporting" hazardous safety conditions and "refusing" to work when confronted with a hazardous safety condition, and "providing" or being "perceived by the employer [as] about to" provide information to a federal regulatory agency to investigate misconduct by a railroad. 49 U.S.C. §20109(a)(1)(C), (a)(6), (b)(1)(A), and (b)(1)(B). (CB at 25). The Complainant argues that the FRSA must be liberally construed as broadly including actions and statement, such as the Complainant's report to T. Thornton of hazardous conditions, refusal to work in hazardous conditions, and intention to seek a lawyer, as protected activity.

The Complainant argues that the Respondent knew of the Complainant's protected activity. "While Respondent may contend that [the Complainant's] conversation with Thornton did not constitute protected activity, there can be no dispute that Respondent was aware of what took place between [the Complainant] and Thornton on the morning of June 11, 2011." (CB at 27). The Complainant cites T. Thornton's e-mail shortly after her conversation with the Complainant detailing his statements to her. The Complainant notes that T. Thornton and Superintendent Bennett then initiated the disciplinary process that resulting in the Complainant's 6/16/2011 charge letter, his suspension without pay, and ultimate termination.

Citing *Rudolph v. National R.R. Passenger Corp.*, ARB No. 11-037, ALJ No. 2009-FRS-00015 (ARB Mar. 2013), the Complainant argues that it is immaterial whether or not the alleged "decision-maker," Division Manager Don Jones, was not aware that the Complainant engaged in protected activity. The Complainant argues that *Rudolph* provides that "proof of a contributing factor may be established by evidence demonstrating that at least one individual among multiple decision-makers influenced the final decision and acted at least partly because of the employee's protected activity." (CB at 28, internal quotation marks omitted). The Complainant argues that there is no doubt that the final decision to charge, suspend, then terminate the Complainant was the result of actions by T. Thornton and B. Bennett as confirmed by senior manager Mr. Rod Logan's testimony that the decision to elevate the matter to senior managers in the Jacksonville office was exclusively T. Thornton's and B. Bennett's. The Complainant argues that had the Waycross Yard managers not chosen to elevate the matter, then the purported decision-maker, D. Jones, would never have known about the Complainant's conversation with T. Thornton. The Complainant notes that D. Jones "freely acknowledged that he relied on the information he received from his local managers when making the decision to terminate [the Complainant.]" (CB at 29). The Complainant argues that under the cat's paw theory of liability, the Respondent cannot evade liability based on the ignorance of a senior manager such as D. Jones, if a lower level supervisor who was aware of the protected activity initiates and brings about the ultimate employment action. Moreover, the Complainant argues that D. Jones in fact knew about the contents of the Complainant's conversation with T. Thornton from reading an e-mail by T. Thornton describing some of the Complainant's protected activity and from phone calls from local managers B. Bennett and T. Thornton.

The Complainant argues that "there is no doubt that [the Complainant] suffered unfavorable personnel action when he was charged with a rule violation on June 17, 2011, suspended without pay, and then discharged. The Complainant notes that the Act specifically prohibits suspension

or discharge of employees who have engaged in protected activity and notes case law finding that merely charging an employee with a rule violation also constitutes unfavorable personnel action under the standard applicable to whistleblower cases over which the ARB has jurisdiction. *See Rudolph v. National Railroad Passenger Corp.*, ARB No. 11-037, ALJ No. 2009-FRS-00015 (ARB Mar. 2013).

The Complainant argues that his protected activity was a contributing factor in his suspension and termination, noting that a complainant need only prove that his protected activity "tends to affect in any way the outcome of the [employer's] decision." (CB at 30, citing *Baily v. Consolidated Rail Corporation*, ALJ No. 2012-FRS-00012, slip op. at 23 (internal citations omitted)). The Complainant argues that he has provided "overwhelming evidence to support the conclusion that [his] protected activity was a contributing factor in the adverse action." (CB at 31). First, the Complainant notes that the protected activity and the adverse action in this case are "inextricably intertwined" because

> "It is impossible to explain why [the Complainant] was charged, suspended, and terminated without also discussing his protected activity in making a safety report to [T.] Thornton on Saturday morning, June 11th. The June 17th charge letter, the July 6th hearing testimony and the August 3rd termination letter all demonstrate that [the Complainant's] protected activity was one in the same with the alleged rule violation that allegedly justified the adverse action."

CB at 32. The Complainant argues that therefore, a presumptive inference exists that the Complainant's protected activity was the cause of the adverse action. The Complainant argues that the temporal proximity between his protected activity and the adverse employment action and the inconsistent application of the GR-2 policy also constitute circumstantial evidence that his protected activity was a contributing factor in the adverse employment action. The Complainant also argues that as the contributing factor analysis only requires that his protected activity play some part in the adverse action, he can still prevail even if the Respondent has a legitimate reason to discipline him. Additionally, the Complainant notes that "[Respondent] managers have admitted that Respondent will discipline employees for engaging in protected activity if they deem the manner in which the employee speaks to be in violation of GR-2." (CB at 34). The Complainant argues that the Respondent cannot succeed in arguing that his use of profanity was an intervening event that severed the connection between the protected activity and the adverse action taken against him because the use of profanity was incidental to the report of the safety hazard. Lastly, the Complainant argues that the "Respondent's eagerness to place blame on its employees when there is an FRA [(Federal Rail Administration)] reportable incident also shows its willingness to punish those who engage in protected activity." (CB at 35). The Complainant argues that the use of profanity was a reasonable response to the Respondent's attempt to blame him for the side-swipe incident despite the information indicating that he had operated the engine at an appropriate rate of speed and that he was not responsible for overloading the track, noting that even T. Thornton believed the charge to be unfair.

The Complainant argues that the Respondent failed to prove by clear and convincing evidence that it would have taken the same action in the absence of the Complainant's protected activity. The Complainant notes that this burden is a "tough standard" for employers. (CB at 36). The Complainant argues, for the same reasons summarized above, that the Respondent cannot

succeed in showing that the unfavorable personnel action was administered because the Complainant used profanity and threatened to shut down the yard. The Complainant notes that the use of profanity in the Waycross Yard among and between employees and managers was common. The Complainant notes T. Thornton's testimony that she did not believe "there would be anyone left working at the railroad if we charged everybody who swore with a GR-2 violation." (CB at 37, citation omitted). The Complainant also notes T. Thornton's testimony that she did not feel threatened by the Complainant during the June 11, 2011, conversation and neither did she believe that he was going to "shut down" the yard. (CB at 37). Therefore, the Complainant argues, "neither the use of profanity or any alleged 'boisterous' conduct was proven to have been an actual motivation for discipline." (CB at 38).

The Complainant argues that he is entitled to an award that includes back pay, reinstatement, emotional distress damages, punitive damages, and attorney's fees. Additionally, the Complainant is entitled to have his personnel record expunged of any references to the June 17, 2011 charges, the July 6, 2011 disciplinary hearing and the March 26, 2012, charges.

The Complainant argues that the "March 2012 Rivers Bar altercation with [Mr.] Bennett would not have occurred but for Respondent's illegal conduct and Respondent cannot benefit from conduct it illegally provoked." (CB at 39). In support of this assertion, the Complainant notes that both T. Thornton and B. Bennett testified that they had "no issues with the manner in which [the Complainant] conducted himself…Moreover, [Mr.] Bennett conceded that the only issue between the two of them on that…night at the Rivers Bar…was [the Complainant's] termination." (CB at 39, citations omitted).

The Complainant argues that the Respondent cannot succeed in arguing that any right to reinstatement and damages should be capped as of the March of 2012 charges because "an employer may not rely on employee conduct that it has unlawfully provoked as a basis for disciplining an employee." (CB at 40, citing *NLRB v. Vought Corp. – MLRS Sys. Div.*, 788 F.2d 1378, 1384 (8th Cir. 1986). The Complainant argues that B. Bennett's testimony regarding the Rivers Bar altercation, including his denial of a "regular habit of entering into fights and altercations at the Rivers Bar," is not credible. (CB at 40). The Complainant notes that he was unable to provide his side of the story related to the altercation due to pending criminal charges. Therefore, the Complainant argues that he is entitled to a finding of fact that all of the witnesses agree that there would have been no Rivers Bar incident in March of 2012 but for the retaliatory termination in violation of FRSA that cost the Complainant his job and a finding as a matter of law that the Respondent cannot rely on alleged conduct that it unlawfully provoked as a basis to discipline the Complainant and cap his damages.

The Complainant argues that in order to be made whole, he is entitled to back pay in the amount of $186,275.00 through December of 2014 for loss of wages and benefits. The Complainant noted his W-2 that showed wages that would equate to an annual salary of $65,000.00 per year and benefits equal to 25% of his salary. The Complainant also notes that the Respondent calculated that the cost savings from suspension and termination of the Complainant amounted to $70,200.00. The Complainant also argues that he is entitled to reinstatement and to employment without a loss of seniority to be made whole. He indicates that conductors of comparable

seniority to what the Complainant would have had but for his termination earned salaries in 2013 between $69,364.00 to $74,601.00 per year.

The Complainant argues that he is entitled to emotional distress damages. He argues that though no medical or psychiatric evidence was presented in this case, his testimony regarding the impact of the Respondent's actions is sufficient to award emotional distress damages. The Complainant notes his own testimony of being scared, intimidated, and harassed when he was facing discipline and the loss of his job. He notes testimony of feeling ashamed and stressed when he lost his job and therefore his friends from work. The Complainant testified that he found it humiliating to have to move in full-time with his father. He testified to his concern that he was "painted by [the Respondent] as an 'ugly' person in his small community." (CB at 42). The Complainant testified that he developed high blood pressure. The Complainant cites other cases in which complainants were awarded damages for emotional distress in the absence of medical or psychiatric testimony.

The Complainant argues that he is entitled to punitive damages as a result of the Respondent's intentional retaliatory conduct in violation of the Act. The Complainant argues that the Respondent's culpability is significant noting the Respondent's eagerness to blame employees for safety problems in addition to suspending and terminating the Complainant for reporting hazardous safety conditions. The Complainant argues that it was the Respondent's plan to charge him with a rule violation for the sideswipe incident, which its own investigation showed was the result of other problems in the bowl or with a yardmaster's actions, that provoked him to "call [the charge] what it was." (CB at43). The Complainant argues that the Respondent's managers then instead "used a never-enforced rule against profanity to retaliate against [the Complainant] in a manner that would certainly dissuade any other worker from raising a safety complaint." (CB at 44). The Complainant argues that the fact the decision to terminate the Complainant was made at the Division level indicates that the Respondent has an "institutional practice to terminate an employee who dares to raise safety reports," and that the only way to correct institutional behavior is to assess a significant punitive damage award. (CB at 44).

Respondent's Position

The Respondent argues that the Complainant did not engage in protected activity because he did not report any unsafe conditions. Therefore, the Respondent argues, it could not have retaliated against him for doing so. The Respondent argues that it dismissed the Complainant because on June 11, 2011, when he was informed of the pending charges against him, the Complainant became irate, used profanity when describing his opinion of the charges, and threatened to shut down the rail yard. The Respondent argues that this conduct constituted a major rule violation-the second by the Complainant in less than one year, for which dismissal was the appropriate sanction. The Respondent argues that discharging the Complainant is consistent with its disciplinary policy and consistent with discipline issued to other employees who committed similar rule violations and who had not engaged in FRSA-protected activity.

The Respondent argues that the Complainant failed to prove that he engaged in protected activity. The Respondent notes the Complainant's testimony that he did not report unsafe conditions to Jacksonville Division Manager Don Jones, the manager who decided to dismiss

him, or to either of the two managers who had input into that decision. The Respondent argues that the only evidence of a report of unsafe conditions is the Complainant's own testimony that he reported unsafe conditions to T. Thornton. The Respondent argues that as T. Thornton "consistently testified over a three-year period that [the Complainant] did not report any such condition; there is no mention of [the Complainant] making such a report in her contemporaneous written account of that meeting (RX 10); and she did not say anything about any such report to either Division Manager Jones or Terminal Superintendent Brian Bennett when she spoke with them on June 11 about [the Complainant's] conduct." (RB at 2). The Respondent argues that between the Complainant's and T. Thornton's testimony regarding the events, T. Thornton's testimony is more credible because it is consistent with a contemporaneous written account, because the Complainant's emotional state during the meeting makes it more likely that T. Thornton's recollection is accurate, the Complainant failed to report any unsafe conditions given the opportunity to do so during his June 6, 2011, meeting with B. Bennett, and because the Complainant's accounts of his meeting with T. Thornton are inconsistent.

The Respondent argues that even if the Complainant reported an unsafe working condition, the report cannot be the basis for a claim under the Act because there is no evidence that he believed the condition violated a federal law, rule, or regulation relating to railroad safety. The Respondent also argues that the statements the Complainant claims he made in his meeting with T. Thornton, that are confirmed by T. Thornton's testimony, that he "could have been killed in the sideswipe" and that the Respondent "had just killed someone in the bowl" fail to identify any specific safety hazard that the Respondent could investigate and correct and do not constitute protected activity under the act.

The Respondent argues that even if the Complainant did report unsafe conditions to T. Thornton, his complaint should be dismissed because neither Jacksonville Division Manager Don Jones, nor any of the managers who had input into the decision had knowledge of the Complainant's protected activity. The Respondent notes the Complainant's testimony that T. Thornton is the only person to whom he has made a report of unsafe conditions. The Respondent states that D. Jones, R. Logan, and Labor Relations never learned of the allegedly protected activity through other means. The Respondent also argues that T. Thornton's knowledge of any purported report of hazardous safety conditions cannot be imputed to Division Manager Jones because T. Thornton was not involved in the decision to charge or dismiss the Complainant. The Respondent argues that because T. Thornton's only role was to report the Complainant's behavior to her own manager, B. Bennett, and to testify in the ensuing investigation, her knowledge of the Complainant's alleged safety complaint is irrelevant.

The Respondent argues that the Complainant cannot show his alleged safety report was a contributing factor in his dismissal. The Respondent notes that the Complainant cannot show any direct evidence of retaliation. The Respondent argues that the only suggestion of direct evidence, the remark allegedly made by B. Bennett that he "really need[ed] to talk to [the Complainant]…before this gets blowed [sic] out of proportion," does not constitute direct evidence of retaliation. (RB at 35). The Respondent argues that the alleged statement, which B. Bennett denies making at all, can be more reasonably interpreted as a reference by B. Bennett "to the fact that [the Complainant] had grossly overreacted to the news of the assessment," rather than as a reference to a retaliatory intent by the Respondent. (RB at 55).

The Respondent also argues that the circumstantial evidence offered, such as temporal proximity, pretextual reason for adverse action, treatment of similarly situated employees, or retaliatory intent, is insufficient for the Complainant to prove his *prima facie* case. The Respondent argues that the Complainant's admission that he engaged in "at least some of the misconduct for which he was dismissed…renders meaningless any temporal proximity between his alleged protected activity and his dismissal." (RB at 3). The Respondent argues that temporal proximity alone is not sufficient to demonstrate that the alleged protected activity is a contributing factor in an adverse employment action, particularly when an intervening action occurs such as the employee's violation of a workplace rule. *See Laing v. Fed. Express Corp.*, 703 F.3d 713, 722-23 (4th Cir. 2013); *Kuduk v. BNSF Ry. Co.*, 980 F.Supp. 2d 1092, 1101 (D. Minn, 2013). The Respondent argues that the Complainant's use of profanity in his meeting with T. Thornton constitutes a rule violation, negating the effect of temporal proximity between any alleged protected activity and the adverse action. The Respondent also argued that the Complainant has not shown that the reason for his dismissal was pretextual, noting that the Complainant admitted to most of the conduct for which he was dismissed. Additionally, the Respondent argues that Mr. Mark Middleton was not similarly situated as the Complainant alleged and offers its own examples of five other employees are similarly situated and were also dismissed or resigned in lieu of dismissal. The Respondent argues its comparator employees show that the Complainant's treatment was consistent with its disciplinary policy and with its treatment of other employees. The Respondent argues that its own proactive investigation of the conditions surrounding the sideswipe incident and its associated implementation of safety measures show that it is not antagonistic to reports of safety concerns. The Respondent argues that the Complainant has not shown any circumstantial evidence of retaliation noting that the Rule 103 assessment, an independent basis for termination, was withdrawn after the Complainant's alleged protected activity and a charge for insubordination was not entered following the Complainant's refusal to return his manager's phone call as instructed. Lastly, the Respondent argues that the Complainant has failed to show that his protected activity was "inextricably intertwined" with the provocative words used on June 11, 2011, noting Mr. Rodney Logan's testimony that an employee's safety complaint and the manner in which the complaint was made were separate issues that would be handled separately.

The Respondent argues that even if the Complainant has made his *prima facie* case, the Respondent has proven by clear and convincing evidence that it would have dismissed the Complainant absent the alleged protected activity. The Respondent argues that the Complainant's non-protected activity, which it characterizes as "angrily telling his manager that something she had just told him was 'fucking bullshit' and threatening to shut down the yard where he worked," warranted discipline. (RB at 38). The Respondent argues that "none of the essential facts in this case would change in the absence of the Complainant's alleged safety report." (RB at 3). The Respondent argues that the Complainant's use of profanity and threats to shut down the yard "did not have anything to do with his alleged safety report; they had to do with his belief that the charges related to the sideswipe were unfair." (RB at 3). The Respondent argues that it did not treat the Complainant any differently from how it treated any other similarly situated employee and that it handled the Complainant's misconduct in accordance with its disciplinary policy. The Respondent argues that its decision to dismiss the Complainant was justified in light of his poor work record, which included having been previously dismissed for

attendance issues and admittedly committing a major rule violation less than a year prior, for which he was assessed a 45-day suspension. Lastly, the Respondent argues that it "simply does not make sense" for it to have retaliated against the Complainant for a report of unsafe conditions related to the sideswipe noting that it reported the sideswipe to the Complainant, and that it had already taken steps to address the unsafe condition about which he was concerned. (RB at 3). The Respondent argues that the Complainant's complaint is essentially that the Respondent dismissed him for reporting something that the company already knew about, already intended to report to the Federal Railroad Administration, and had already begun to address.

Regarding potential damages if the court were to find entitlement, the Respondent argues that neither reinstatement nor front pay are appropriate remedies in this case. The Respondent argues that the Complainant's assault charges, still pending at the time of hearing, render reinstatement and front pay damages inappropriate in this case. *See e.g., Hursh v. Frontier Express,* ALJ No. 2009-STA-28, slip op. at 33 (ALJ Mar. 24, 2010) ("in cases where after-acquired evidence would have given an employer legitimate grounds for termination, neither reinstatement nor front pay are appropriate remedies."). The Respondent argues that though the Complainant invoked his Fifth Amendment right not to testify about this incident, his failure to impeach B. Bennett's testimony with the surveillance video of the incident or to call two witnesses to the event indicate that B. Bennett's description of the event is accurate. The Respondent notes that at the time of this incident, the Complainant's appeal of his dismissal was still pending and that it was therefore possible that an arbitrator could have reinstated him, which is why the Respondent charged the Complainant with another major rule violation for "verbally threaten[ing] and physically assault[ing] a company officer." (RB at 78). The Respondent notes that there was never a hearing on these rule violation charges because the arbitrator upheld the Complainant's dismissal. However, the Respondent argues that it would have dismissed the Complainant based on these charges relating to the March 2012 fight with B. Bennett.

The Respondent also argues that the Complainant is not entitled to back pay because he did not mitigate his damages. The Respondent argues that an employee who makes "*no effort*" to seek other employment has failed to mitigate his damages regardless of whether the employer establishes that other positions were available. (RB at 79, citing *Roberts v. Marshall Durbin Co*., ARB Nos. 03-071, 03-095, ALJ No. 2002-STA-00035, slip op. at 18 (ARB Aug. 6, 2004). The Respondent notes the Complainant's testimony that he did not make any effort whatsoever to find another job until one year after his dismissal in August of 2011. "Instead, he simply collected unemployment, even though there were substantially equivalent jobs available for which he was qualified." (RB at 80, citing job advertisements RX 54 at 4-5, RX 55 at 4.). The Respondent also argues that the Complainant could have used his unemployment compensation to update his commercial driver's license and medical certifications to qualify for truck driver jobs similar to the job he now holds. Therefore, the Respondent argues, the Complainant is not entitled to any back pay until after he started looking for employment in August of 2012. The Respondent also argues that even after August of 2012, the Complainant did not diligently search for alternative employment until February of 2013. The Respondent notes that the Complainant testified he only applied for one job during that period and that he turned down another job because it did not pay enough to justify the commute distance. "Otherwise, the only effort that [the Complainant] made to get another job before obtaining his current job through a family connection was to make a handful of trips to the unemployment office." (RB at 80). The

Respondent cited another ALJ case with "remarkably similar facts" in which the ALJ denied back pay where the complainant, "did not search for other work at all for an extended period," and "[e]ven when he did look for work, his search …was lackluster at best." (RB at 81, quoting *Winch v. CSX Transp., Inc.*, ALJ No. 2013-FRS-14, slip op. (ALJ Dec. 2014)).

The Respondent argues that if the Complainant is awarded back pay, it should be cut off as of the March 14, 2012, bar incident with B. Bennett, which would have warranted termination standing alone. The Respondent argues that in cases in which an employer has information acquired after terminating an employee that would have justified termination independently, an employer is only liable for back pay from the date of the unlawful discharge to the date the new information was discovered. *See Clemmons v. Ameristar Airways, Inc.*, ARB No. 12-105, ALJ No. 2004-AIR-11 slip op. at 5 (ARB Nov. 25, 2013). The Respondent also argues that any back pay award to which the Complainant might be entitled should be reduced by the Complainant's other sources of income such as the money he earned doing odd jobs from August of 2012 to January of 2013, his earnings from Thom's Transport Company in 2013 and 2014, and his unemployment benefits.

The Respondent also argues that the Complainant failed to prove non-pecuniary damages by a preponderance of the evidence. The Respondent reviews case law indicating that "terse statement[s]" of emotional hardship are not sufficient and do not satisfy this burden and that the complainant must show objective manifestations of distress. The Respondent notes the ARB's practice of considering awards in like cases when determining the appropriate amount of compensatory damages. The Respondent argues that the Complainant's embarrassment at living with his father cannot be attributed to the dismissal because the Complainant testified at deposition that he had lived with his father for 20 years. The Respondent notes the Complainant's inconsistent testimony regarding friends he lost because of his dismissal, because he also testified that "nobody ever told him that they did not want to be his friend because [the Respondent] had dismissed him." (RB at 85, citing TR at 224-225). The Respondent argues that the Complainant also failed to seek mental health treatment for his alleged emotional distress, despite having sought treatment "three to four times" prior to his dismissal, which he voluntarily discontinued reporting that he was feeling much better. (RB at 85-86). Lastly, the Respondent argues that the Complainant's report of high blood pressure does not qualify as an objective manifestation of distress because the condition did not develop until "years after" his dismissal. (RB at 86).

The Respondent argues that the Complainant has not established that the Respondent's actions satisfy the ARB's standard for punitive damages. The Respondent argues that the Complainant has not shown that it demonstrated, "through its treatment of the complainant and through its attitude toward safety, a reckless or callous disregard for complainants' rights that must be deterred." (RB at 88, internal quotations omitted). The Respondent also argues that its conduct does not justify a punitive damages award because there is no evidence that the Respondent acted with reckless or callous disregard for the Complainant's rights, or intentionally violated the FRSA. The Respondent argues that it showed more concern for hazardous safety conditions than the Complainant did. "Even crediting [the Complainant's] testimony, he reported a single hazardous safety condition nearly one week after the sideswipe occurred, and never did anything to follow up on his report." (RB at 88, citing TR at 201). The Respondent contrasts the

Complainant's actions with its own noting that it "spent weeks investigating the sideswipe for the express purpose of identifying unsafe conditions," and "implemented new safety measures both immediately after the sideswipe and at the conclusion of its investigation." (RB at 88). The Respondent argues that its treatment of the Complainant was in accordance with its disciplinary policy and did not violate the Complainant's rights under the applicable collective bargaining agreement. The Respondent argues that as a company, and the Jacksonville Division in particular, it encourages employees to report safety concerns, indicating that there is not a need for punitive damages to act as a deterrent.

The Respondent argues that it has an affirmative defense in its good-faith effort to comply with whistleblower laws. It points to its policies prohibiting retaliation for protected activity, training programs for managers on compliance, and protocol for disciplinary actions that remove the decision from the employee's direct chain of supervision. The Respondent also argues that any possible punitive damages are limited by the Due Process Clause of the Constitution, which prohibits "grossly excessive or arbitrary" punitive damages awards. (RB at 91). The Respondent argues that the $250,000.00 in punitive damages sought by the Complainant would be grossly excessive as the amount is not justified by the facts of the case.

SUMMARY OF RELEVANT EVIDENCE

Testimonial Evidence

Complainant's Testimony (TR 38-243)

The Complainant testified that he was 52 years old at the time of the hearing and had lived in Blackshear, Georgia, on and off for 42 years. He testified that Blackshear is about nine miles from Waycross, Georgia. He testified that he is a high school graduate and that he attended approximately one year of college. The Complainant testified that the area is a rural farming community and that the Respondent is the biggest employer in the community. The Complainant testified that aside from farming and railroad there are some other smaller companies in the area, but none that match the pay of the Respondent.

The Complainant testified that as of the hearing date he was currently employed at Thom's Transport in Blackshear, Georgia. He testified that Thom's is a commercial flatbed delivery service company that operates on the East Coast. He testified that he drives a flatbed for Thom's, with his schedule having him driving away from home from Sunday through Friday or Saturday morning, depending on where he is assigned to make deliveries. The Complainant testified that he began working for Thom's February 6, 2013. The Complainant testified to his work other than long haul trucking stating that he started working at a paper company where he started shoveling bark and worked his way up to supervisor on a paper machine over 16.5 years before the company went bankrupt and shut down. The Complainant testified that in June of 2011 he was employed by the Respondent as a conductor in the Waycross Rice Yard. He testified that he had worked for the Respondent since February of 2005 and that he was hired as a conductor. He testified that since that time he worked in other locations in Alabama and Maryland.

The Complainant testified that as a conductor he was responsible for building trains in the Waycross yard and that he was "RCO qualified" meaning he could run an engine with a remote control box in lieu of an engineer. (TR at 42). The Complainant testified that working as a conductor for the Respondent is dangerous work because of constant movement of heavy equipment, live tracks, and variable working conditions including night time and fog. The Complainant testified that "you could get coupled up in there. You could get run over." (TR at 43). The Complainant explained that getting "coupled up" means that one could get crushed between two rail cars. (TR at 43). The Complainant testified that between January of 2011 and early June of 2011, he was primarily working in the Waycross, Georgia, yard. He testified that his work consisted of "hustling jobs," working the hump, and working in the bowl in the Waycross Rice Yard. He testified that his seniority, which is based on his hire date, did not enable him to select certain more desirable jobs.

The Complainant described the "bowl" where the trains come in from the forwarding yard and where the cars are built into a train to make deliveries to the Respondent's customers. The Complainant explained that when an individual car comes over the hump, it is moved into the bowl by gravity. He explained that the bowl is huge and the tracks in the bowl are approximately 3,000 feet long. There are 64 tracks with associated lead tracks in the bowl. The Complainant testified that there are retarders on one end of the tracks to keep the cars from rolling toward the "B Tower" and from fouling the lead at the end of the bowl opposite the hump. (TR at 46). He explained that other than the retarders, which are air devices that catch the cars, there is nothing stopping the cars from rolling except impact with other cars.

The Complainant testified that during the period between January of 2011 and June of 2011 he often worked in the bowl building trains. He testified that this work happened in all sorts of weather including pouring rain, fog, and nighttime; stating, "you're in the elements. Right next to you are live tracks where there are cars that are rolling down this hump…and they are constantly connecting with other cars all around so it's very noisy." (TR at 47). He testified that "you have to be aware of your surroundings at all times" particularly when walking down the track because there are slip and trip hazards and sometimes things fall off the cars such as scrap metal.

The Complainant reviewed the layout of the yard shown in a picture in CX 23 with the specific tracks he was working at the time of the incident shown in a diagram also in CX 23. The Complainant indicated that the A Tower and the hump are on the east end of the bowl and that the B Tower is on the west end of the bowl. He explained that in the diagram in CX 23 marked CSX000322 the lead is the track connecting tracks labeled 45, 46, 47, and 48 and that feeds cars into the individual numbered tracks. The Complainant testified that the photos in CX 23 marked CSX000324 and CSX000325 show what it is like working between the tracks in conditions he believed to be broad daylight. He notes that "you can't really see from one end all the way to the other." (TR 49-50). The Complainant described the operations in the A and B Towers. He stated that the yardmaster in the A Tower controls the humping procedures, directs the cars to individual tracks, and blocks out tracks for personnel on the ground. The Complainant testified that the tower is about five or six stories tall. He testified that the B Tower is on the opposite end of the yard.

The Complainant testified that there are production expectations for conductors working in the bowl to work as "reasonably fast as we possibly can." (TR at 51). The Complainant testified that in the bowl there are usually "four to five jobs going on at one time over one radio communication." (TR at 52). He testified that in this environment the conductor must "stay on his toes" and remain aware of what is going on around them, particularly paying attention to whether there is work happening on the next track.

The Complainant testified that approximately two to four percent of the employees at the Waycross Yard are female. The Complainant characterized the environment as "a blue collar working environment. It's not an office environment. I mean the use of profanity is very common, daily." (TR at 53). However, he testified that "I don't think we direct ugly comments at each other. I don't think you make a rude or curse somebody ugly in an ugly kind of way, but the use of profanity and use it in jokes and so forth is daily, a daily usage thing." (TR at 53). The Complainant testified that there is a difference between using profanity and "cursing someone out," and stated he thought there was a difference between using profanity in a general statement or in a joke and calling someone names or directing an "ugly remark" at them using profanity. (TR at 54). He testified that the latter might happen occasionally "if one guy is a little upset with the other" but that it was not common because most of the workers get along with each other and work together. (TR at 54). The Complainant testified that he had heard the word "bullshit" used in the Waycross yard in conversations between employees. He testified that he could not recall a specific example of when the word was used in conversations with managers but testified that "it's pretty commonplace, maybe statement to make." (TR at 55). The Complainant testified that he had never seen or heard of an employee being disciplined for using profanity. When asked whether he had ever heard of somebody being fired for using profanity he responded, "definitely not." (TR at 55).

The Complainant testified that he came to work at about 11 o'clock P.M. on June 4, 2011, for an overnight shift. He testified that he was working before the sun came up so it was very dark that morning, and that he believed it was cloudy, rather than moonlit. He stated that the B Tower yardmaster instructed him to begin working on coupling cars on Track B46. The Complainant testified that he was informed by the A Tower yardmaster that the track was full. The Complainant explained that a full track means that the track was at capacity to be able to work and that the track would not hold any more cars. The Complainant testified that a full track meant he would have to couple the cars very carefully which might require working more slowly. The Complainant testified that the A Tower yardmaster would make the decision to fill a track. He testified that working on the full track on the morning of June 5, he took extra precaution but also tried to be productive and do the job as quickly as he could.

The Complainant testified that when he finished building the cut of cars he stretched them out to ensure that the cars were all properly attached. He testified that he walked to the end to make sure that each of the couplings were properly attached. Once he saw that they were attached, he notified the B Tower yardmaster that he had put the track together. The Complainant testified that as he rode the train out of the bowl he heard a dragging sound from the side of the train opposite of where he was riding. He testified he got off the train at the end of the track where the retarders are (western end near Tower B) and went to the other side of the car where he noticed that a hand brake from an auto rack was lying on the ground. The Complainant testified that he

reported to the B Tower yardmaster that there was damage on the car and that the brake was dragging. He testified that the B Tower yardmaster told him to cut the damaged car loose, leave it on the B46 track, and that inspectors would take a look at it later on. The Complainant again referred to the picture in CX 23 marked CSX000324 stating that the photo showed a hand brake that looked like the one he was describing, but that he was not sure if the photo showed an auto rack car. The Complainant testified that he did not know when the damage occurred. He testified that he did not see or hear any damage occur and that he was not aware of any sideswipe incident while he was working. The Complainant testified that the first indication that something was not right with the cut of cars was when he heard the dragging sound.

The Complainant testified that it was not possible to see from one end of the car to the other while he was working because of the distance of the track section is 3,000 feet long and because he was working at night with a flashlight. The Complainant testified that while the yard was lit with large lights like at a stadium, he was working between rail cars that block the light so the only thing he has to illuminate the work area is the flashlight on the box he works with.

The Complainant testified that when he reported the damage he did not hear from anyone in A or B Tower that there had been a sideswipe and that he went home when he finished his shift on June 5th. The Complainant testified that he probably went to bed when he got home but that later that day he received a phone call to report back to A Tower. He testified that he responded, "Look this is my off day. Why am I getting called in to work" and that they said, "Well, it will be in your best interest if you come in and discuss what took place because we've got some accident or something going on." (TR at 65). The Complainant testified that he returned to work and met with Mr. Blue Bailey who informed him that some cars were damaged and that they were doing an investigation. The Complainant testified that he reviewed his last shift with Mr. Bailey telling him where and how he worked that morning as he had just described in his testimony. The Complainant testified that he was told he needed to be back the next morning and that he was probably going to be taken out of service while there was an investigation. The Complainant testified that when he returned to work the next day, June 6th, he reported to the A Tower where he learned that because of the damage the sideswipe incident was an "FRA reportable accident." (TR at 66).

The Complainant testified that he believed T. Thornton was present at the meeting, though he admitted that it might have been when he met with Mr. Bailey on his off day, and that she told him that there was a lot of damage to about five different cars that swiped the car that the Complainant saw the brake damage on. The Complainant testified that T. Thornton was not sure whether it would qualify as an FRA reportable incident because there is a threshold dollar amount before it becomes reportable. The Complainant testified that he sat around at work that day while the Respondent investigated, including "downloading the engines." (TR at 67). The Complainant explained that engines have something like the "black box" on airplanes that record its movements and speed, which can be downloaded as part of the investigation in addition to determining dollar amounts of damage done in the accident.

Referring to CX 11, the Complainant testified that he believed the name "B.K. Bennett" in the box labeled "Officer Completing Report" referred to Mr. Brian Bennett, the terminal superintendent for the Waycross Yard. The Complainant testified that the terminal

superintendent is the highest management officer at the yard and that B. Bennett was the terminal superintendent in June of 2011. The Complainant testified that the term "bad ordered," used in the description of the event portion of the report at CX 11, means that a car has to be fixed, but that it does not necessarily relate to a collision with another car.

The Complainant testified that the car with the damaged handbrake was the last car or "bottom" car, closest to the hump side of the bowl (eastern end near Tower A), or in the CX 23 diagram marked CSX000322, the car closest to the right side of the page. The Complainant testified that when coupling cars the stationary cars move in reaction to the force of the cars pushed by the engine against them because the individual cars do not have brakes on them like the engine does. In the same diagram, that movement would be from left to right on the page, or toward the lead and the hump. The Complainant testified that "blocking out" a track at the hump end of the track protects against additional cars entering the track, but does not prevent cars from moving out of the track in the other direction. The Complainant testified that the shape of the bowl helps to keep the cars safely in the track while they are being coupled. He explained that the expression "foul a track" refers to when cars pass yellow cross ties that indicate to conductors the location where cars must stop so as not to interfere with the movements of trains on other tracks. The Complainant testified that he did not believe the hump end of the bowl had these yellow cross ties. He also testified that there were not retarders on the hump end of the bowl. The Complainant reiterated that the only measures he knew of to prevent the cars from fouling the track were the shape of the bowl itself keeping the cars in the track and leaving enough room on the track to be able to do the work.

Referring to the email chain containing a bulletin at CX 18, the Complainant testified that the "T&E Crews" are the conductors and engineers and noted that the location was the Waycross-Rice Yard. The Complainant confirmed that subject of the bulletin is "Bowl Operations" and testified that it requires an employee to be on the rear of the track if a track has less than five car lengths of room when coupling.

Returning to Monday, June 6, when the Complainant was waiting for the results of the investigation following the sideswipe incident, the Complainant testified that when he returned from lunch, he ran into a trainmaster who told him he had nothing to worry about based on the downloads. The Complainant reviewed the Report of FRA Reportable Sideswipe Track B46 & B48 at CX 23 noting sections indicating that he had followed procedures correctly. The Report indicated that he never selected more than couple speed and never got over 1.5 miles per hour. The Complainant testified that couple speed is 4 miles per hour. The Complainant testified that the couple speed is so low to prevent the cars from hitting each other and fouling the track. When asked about the report's conclusion that the parameters were not sufficient to protect against cars being knocked into the foul during proper train handling procedures, the Complainant testified that he did not have anything to do with setting the parameters that were in place. When asked about the report's conclusion that the audible alarm for "Track in the Foul" that was turned off, the Complainant testified that he had no control over that action.

The Complainant testified that later in the day of the investigation he met with B. Bennett. He testified that though B. Bennett told him the downloads showed that he had not done anything wrong, Mr. Don Jones believed there was no way the Complainant did not notice the sideswipe.

The Complainant testified that B. Bennett then required a written statement from the Complainant stating what had happened and that had he been aware of the incident he would have stopped working and notified the proper people. The Complainant confirmed that his written statement was at CX 23 at CSX000327-328. The Complainant explained that the portion of the statement referring to getting "head protection from Y380 + Y381 + Y382" referred to coordination with the B Tower yardmaster and a conductor whose job it is to ensure that trains do not collide with one another when they are leaving the bowl at the same time.

The Complainant testified that the diagram at CX 20 shows basically how the sideswipe occurred, but that the diagram shows track B48, B47, and B46 on the opposite side. He testified that at the time of the sideswipe, he would have been four to five car lengths from the end of the track, but that the cars he was working with at the time were car racks, which are approximately 90 to 120 feet long. He testified that it was dark between 4:30 and 5:00 that morning and that the "sound environment" at that time included cars rolling and ramming into each other constantly. (TR at 84).

The Complainant testified that after he gave his handwritten statement to B. Bennett he was not involved in any other part of the investigation and that he was told he could go home. Referring to CX 12, the Complainant noted that the exhibit indicates that on June 5, 2011, in Waycross, Georgia, the column describing the cause of the FRA Reportable incident indicates "human factor." (TR at 86). The Complainant testified that no one approached him at any time before Saturday, June 11, to inform him that a human factor was involved despite what the computer download showed. Referring to the e-mail chain at CX 13 at 2, the Complainant explained that the "Taps team" is assigned to investigate incidents and he testified that he believed that the code S016 would relate to a signal error or signal electrical problem because of the "S." The Complainant testified that he was not responsible for any of the four items that B. Bennett listed as reasons for changing the cause code from H301 to S016.

The Complainant testified that the sideswipe incident of June 5, 2011, was a concern to him as a safety hazard; he testified that he could have been killed had the incident occurred while he was between the cars moving draw heads. The Complainant testified that sideswipes were "pretty common place" and noted a fatal incident that occurred shortly before the sideswipe in which he was involved. The Complainant testified that the employee involved in that accident was working in the same area that he worked in, but that he did not believe the other employee was performing the same duties. The Complainant testified that in his opinion the new policy bulletin that was issued following his sideswipe incident did not prevent cars from fouling the switch and that the only way to ensure that did not happen was to install retarders or secure the last car with brakes.

The Complainant testified that after his meeting with B. Bennett, he was informed that a close friend, whom he had known for 27 years, was killed in a car accident, so he was "highly upset." (TR at 93). The Complainant testified that though this friend also worked in the yard, her accident did not have anything to do with the railroad. The Complainant testified that he was devastated by her death and that he was a pallbearer at her funeral that week. The Complainant testified that B. Bennett was aware of the death because he was supportive of the other employees, allowing them to take time off to attend the funeral and sending flowers. The

Complainant testified that he believed everyone at the Waycross Yard was aware of the death, including T. Thornton.

The Complainant testified that on Saturday, June 11, 2011, he returned to work as scheduled. He testified that the week leading up to that date was "very unusual" and that he had never been the subject of an investigation related to a sideswipe or any other property damage before. (TR at 95). The Complainant testified that as of the morning of June 11, 2011, he was under the assumption that the investigation was over with as far as he was involved. "I assumed that once they didn't find that I did anything wrong that they would get to the root of the problem….I was not given any indication that I had done anything at all wrong." (TR at 95-96). The Complainant testified that he believed that he had been cleared of a rule violation after writing the statement as requested by B. Bennett. The Complainant testified that before he started his shift that morning, T. Thornton asked him to step out of the break room with her. The Complainant testified that T. Thornton informed him that an assessment was entered for him for violating Rule 103. The Complainant testified that he asked T. Thornton was Rule 103 was and that she told him that it was "failure to protect a shove." (TR 98). The Complainant testified that he asked if this news meant that the Respondent would try to blame the incident on him. The Complainant recounted the conversation as:

> She said, "Yes, [], that's what they're going to do." I said, "You're kidding me" and she said, "No, sir, I'm not." I said, excuse the court, I said, "Well that's bullshit." I said "I can't believe that you're going to say that it's my fault." I said, "There's no way, Ms. Thornton, that we can be in two places at one time" and then I grabbed myself and kind of got my thoughts for a minute because I'm talking to a lady and I wasn't brought up to use curse words to talk to a lady like that so I apologized immediately to Ms. Thornton and I said, "Ms. Thornton, I'm sorry for using the profanity word. I didn't mean to curse at you and use the curse words in front of you and she said, "[] that's okay" and I said, "Ms. Thornton, I'm going to tell you, I'm not going to accept this." I said, "There's obviously some problems that you aren't addressing. I already heard they made some changes over the radio. I hadn't come on duty yet, but I heard the yard master coming over the radio and telling them how many car lengths of room there was in there" and I said, "Ms. Thornton, we can't be in two places at one time. I can't stand here at the couple and tell what's going to happen all the way at the end of a track." I said, "I could have been killed in this Ms. Thornton." I said, "It's obvious there's something wrong here. I could have been coupled in here. I could have been killed. Somebody's already got killed a week or two ago in the bowl. This is just too dangerous." I said, "For you all to write me up and say that it's my fault, I don't really think you all are addressing the true issues of what's going on here if you're blaming the guy that's on the ground." I said, "If we have to walk back in to see how much room we've got in the other end and you all can't make it safe for us to get in this track and couple it, how are we going to be able to work? How are we going to be productive? How are you going to be able to move cars if we got to walk constantly from one end of the track to the other?" I said "There's no way we're going to be moving any cars. You might as well just shut the yard down." I said, "Look, I'm going to be honest with you. I'm going to talk with my other workers, my co-workers that work down there in the bowl and if this is the way it's got to be and you're going to find us at fault every time they put too many cars in the track or we run out the other end, then we're going to have to change the way we're working. We're going to have to walk down there, back into" and I said, "and we're going to have to protect ourselves from being killed or being hurt" and then she said,

> 'Well [], I know exactly how you feel." She said "I understand." She said "Brian Bennett is going to come in after lunch or be in later today…and he'll meet with you and talk to you about it."

(TR at 98-100). When asked whether he said anything during this conversation about talking to a lawyer, the Complainant answered:

> Oh I did. I said, "Look, Ms. Thornton," I didn't know the proper authorities as to who to report things to. I said, "Ms. Thornton, I'm not going to set [sic] this." I said "if I have to talk with a railroad attorney and file a report with the FRA, whatever I've got to do, I'm just not going to accept it. I don't think it's right to charge us for the incident taking place. There's no way we can be responsible for this."

(TR at 100). The Complainant testified that during this conversation he had mentioned that the Respondent knew it was in the wrong because of the bulletin announcing the policy change; however, he testified that at the time of the conversation he did not yet realize that there was a bulletin, only that he had heard about the change in radio communications he had heard that morning.

The Complainant testified that when he used the word "bullshit," he meant that it was "not right,…not correct." (TR at 101). The Complainant testified that when T. Thornton left he sat for a moment, might have smoked a cigarette, and then returned inside. The Complainant said that he told a J. Dixon what had just happened and that he did not feel it was right. He testified that he told J. Dixon he would call T. Thornton because he could not focus on his work. "I said, 'There's no way. I'm going to get somebody hurt.'" (TR at 101). The Complainant testified that he then called T. Thornton, about eight or ten minutes after she had left, and told her that, "my mind is not on my job. I'm obviously distracted and I need to go home." (TR at 101). He testified that he agreed to try to stay until his relief came in. The Complainant testified that J. Dixon said that he would cover his job for him while he had another cigarette and to take it easy because he could tell the Complainant was upset. The Complainant testified that he had another cigarette and tried to put the situation behind him and get back to work but that because a substitute could take up to two hours to come in to work he did not want to risk trying to work and possibly hurting somebody. The Complainant testified that he then called T. Thornton back, approximately ten minutes after the previous conversation with her, and " I explained my concerns with her that me being there for the two hour period of time was just dangerous and I couldn't do it or I didn't feel like I should do it." (TR at 102). The Complainant testified that he asked if J. Dixon could cover his job for a couple of hours. The Complainant testified that T. Thornton approved that plan and told him he could go home.

The Complainant testified that during his conversation with T. Thornton he raised several safety issues. He testified that he was concerned that he could have been coupled or killed, about the fact that cars come out of that end of the bowl, about the fact that it happened prior to it happening to him as the company was aware, that it was impossible for them to be in two places at once to watch the coupling and to watch the room at the end of the track, and that he would "notify the FRA and get a railroad attorney if I had to file for an investigation into the matter so they could find out exactly what the proper fix of it was or what to do about it." (TR at 104). The Complainant testified that he did tell T. Thornton that he would have to change the way he

worked, that he would have to "walk up and down the tracks to make sure how much room was in there after we coupled each time and that's where I made the statement to T. Thornton. I said, 'Ms. Thornton, if we're walking back to up and down the tracks like this, we're not going to be moving any cars and you all…are just going to shut the yard down because we're not being productive. It's just going to be very counterproductive." (TR at 104). The Complainant testified that he did not threaten to shut down the yard or do anything harmful to the yard. The Complainant testified that he told T. Thornton that he would talk to the other workers because he was concerned about their safety as well because the same thing could happen to them while they we reworking on coupling cars.

When asked if he used the phrase "fucking bullshit" when talking with T. Thornton, the Complainant testified that "I have never said the F word" to T. Thornton and that "you just don't talk that way in front of a lady." (TR at 105). The Complainant testified that he had heard the word used in the Waycross Yard "pretty regular," such as in jokes, but not in front of ladies. (TR 105-106). The Complainant testified that he had never seen anyone disciplined or terminated for using the "F word." The Complainant testified that although he used the word "bullshit" to describe that the decision to charge him was wrong, he did not swear at T. Thornton. The Complainant reiterated that he apologized to her for using the word, "bullshit" and that he did not raise his arms, invade her space, threaten her, or raise his voice with T. Thornton. He testified that he had never been disciplined before for profanity or boisterous behavior and that he had never had any negative encounters with T. Thornton or B. Bennett. The Complainant testified that when she left the B Tower at the beginning of the work day, T. Thornton did not say anything about a GR-2 violation, and that he could not remember what she said exactly but that he assumed he was supposed to go back to work. The Complainant testified that he assumed he was supposed to go back to his job because he called her shortly thereafter to get her permission to leave. The Complainant testified that she asked if he could stay until a replacement could come in. He testified that he ultimately decided to leave that morning because he did not feel he could be completely focused on his job, he was afraid he would make a mistake, and that it would be safer to not work that day.

The Complainant testified that although the news from T. Thornton was upsetting, he did not act in a manner that was boisterous or irate. He described his emotional state as "overwhelmed" and "confused, I guess, too because I couldn't believe that they were - - - after the downloads and all the stuff that we went through that they were saying that I could have done anything wrong." (TR 109). The Complainant testified that he was also confused because the rule 103 relates to shoving cars in a track but the cars he was working with were already on the track.

Referring to the e-mail from T. Thornton at CX 4, the Complainant testified that he had seen it during his investigation. The Complainant disagreed with T. Thornton's summary that after she advised him that an assessment had been put in, he "immediately made comments that he would shut this yard down." (TR at 110). The Complainant testified that what he actually said relating to shutting the yard down was that "we would have to change the way that we would work, there would be no way to make the production in that yard and it would slow things drastically down. To do that, [the Respondent] just will shut the yard down because it's all going to back up….and it wasn't that I was going to do anything personally, but by changing the way I was going to have to work and my co-workers, it was going to drastically reduce production." (TR at 111).

The Complainant testified that he agreed with T. Thornton's summary that he stated he would "walk every track" and explained that that meant that "I would have to walk back into on the tracks, that I would have to protect the other end to see how much room. Every time you coupled, you're going to have to walk back in too to protect that end to make sure you've got enough room after you coupled and those cars aren't shoved out the other end." (TR at 111). The Complainant testified that walking the length of the track could take as long as 20-25 minutes each time, walking on the rocks at night. He testified that he agreed with T. Thornton's summary that he would "call a lawyer" stating that he told her that he would talk with a "railroad attorney" to find out what his rights were and "how to file a safety issue or a safety complaint with the FRA and ask them to investigate it." (TR at 112). The Complainant also testified that he agreed with T. Thornton's summary that he told her he could have been killed during the incident and that someone else had recently been killed in the bowl stating that, "I did bring that to her attention about how dangerous it was out there." (TR at 112). The Complainant testified that he agreed with T. Thornton's summary that he told her the Respondent knew they were wrong because they had put in new procedures, referring to the bulletin and that he had heard about on the radio communications, to prevent the same thing from happening again. The Complainant also testified that he agreed with T. Thornton's summary that he had been to viewings and funerals of multiple close friends that week and that he was already under stress from the loss of his friends, but that he was not sure if three was the correct number.

The Complainant testified that he did not agree with T. Thornton's characterization of him as acting "very irate" or "cursing and carrying on" stating that "in no kind of way was I ugly to Ms. Thornton…the only curse word I said was in the beginning of the conversation which I apologized to Ms. Thornton for. As soon as it came out of my mouth, I felt bad by saying it and that was the word, bullshit, that I said." (TR at 114). The Complainant testified that he agreed with T. Thornton's summary that in response to his request to leave because he was too upset to work, she asked him to stay until a relief could arrive, which he agreed to try. The Complainant testified that he agreed with T. Thornton's summary that shortly thereafter he called back and told her that he was too upset to work and that he was afraid he might get someone hurt and that he had to leave. The Complainant testified that at no time did T. Thornton tell the Complainant that he had to leave because of his conduct or any alleged threats to shut the yard down.

The Complainant testified that after he left that morning he spoke with his local union chairman, Mr. Timmy Riggins, from the car on his way home regarding the charges. The Complainant testified that T. Riggins told him that he had done the right thing by requesting to leave if he could not focus and that T. Riggins had told him he would look into the situation. The Complainant testified that when T. Riggins called him back, T. Riggins indicated that the Complainant was marked off as "sick" for the day. The Complainant testified that the marking was later changed from "sick" to "refusing to work." He testified that he never refused to work, "I just didn't feel like it was safe for me to be out there." (TR at 116). He testified that he next returned to work when he and T. Riggins tried to meet with B. Bennett the following Wednesday, around 1:30 P.M. The Complainant testified that between leaving work and his meeting with B. Bennett he was able to work but that he believed the Respondent had him in a "refusing to work" status.

The Complainant testified that when he met with B. Bennett, T. Riggins and a trainmaster named Mr. Scott "Parrot or Prevett or something like that" were also present. The Complainant testified that at this meeting, T. Riggins discussed the Rule 103 violation with B. Bennett, but that B. Bennett interrupted him and informed them that the Complainant was not going to be charged with a Rule 103 violation. The Complainant testified that he initially thought this was good, but that B. Bennett then informed them that the Respondent would be charging the Complainant with a GR-2 violation saying that, "Well, you said some ugly stuff down there to T. Thornton and we didn't agree with it." (TR at 118). The Complainant testified that his reaction was to wonder what B. Bennett could be referring to because he could only recall saying the word "bullshit." He also testified that then B. Bennett directed his attention at the Complainant and told him in an "ugly tone of voice like an arrogant tone of voice just said, 'Whenever I call somebody, I expect them to call me back.'" The Complainant testified that he believed this comment was in reference to him not calling B. Bennett back after he spoke with T. Riggins.[6] The Complainant testified that after his meeting with B. Bennett he was taken out of service pending investigation, and that he was never charged with a Rule 103 violation. Referring to CX 23 at CSX000331, the Complainant testified that the seven bullets under the heading "Action Plan" do not relate to a failure to protect the shove or a Rule 103 violation. Referring to the e-mail at CX 10, the Complainant testified that he was not informed of the removal of the Rule 103 charge before the June 15, 2011, meeting with B. Bennett stating that, "that's what me and T. Riggins both thought that we were going to sit down and talk with [B. Bennett] about." (TR at 120).

Referring to the letter at CX 17, which the Complainant identified as the letter that charged him with the GR-2 violation, the Complainant explained that a "waiver" is sometimes offered by the Respondent to charged parties, allowing them to admit they did something wrong and accept a small amount of time out of work in lieu of having an investigation. Referring to the email from D. Lewis at CX 6, the Complainant testified that he did not know D. Lewis in June of 2011 and that he was not aware of her recommendation for a waiver, or as the e-mail phrased it a "slap on the hand" in this case. (TR at 122, referring to CX 6) The Complainant testified that aside from the meeting with B. Bennett, he did not speak with any of the Respondent's management before the hearing described in CX 17 about the events of June 11, 2011, nor did he discuss the incident with Mr. Don Jones. The Complainant testified that he was suspended without pay while he was awaiting the decision of the investigation.

The Complainant testified that he had a major rule violation on his record prior to June of 2011 while he was working for the Respondent in Baltimore, Maryland. He testified that he was offered and accepted a waiver admitting to the rule violation on that occasion. He testified that the offense was driving faster than directed in a bulletin that instituted a temporary speed restriction in a particular area. He testified that he was new to the area and may not have been properly trained or may not have read the bulletin lowering the speed in that particular area, but that he signed the waiver and accepted responsibility because "I did actually commit the offense and owned up to it." (TR at 124) The Complainant testified that he was in Baltimore temporarily due to being on furlough at home and manpower shortage in Baltimore. The Complainant testified that the investigational hearing did not inquire into the major rule violation in Baltimore. The Complainant testified he understood from his union representative that for the investigational hearing he should be honest and admit that he used profanity with T. Thornton,

[6] The testimony is not clear regarding the date that this unreturned phone call took place.

and be apologetic "because actually I was under the impression they were going after my job. So, to go in there more or less hat in hand to, I guess, ask for forgiveness for using the profanity work because it is a definite rule violation and not to make any waves basically." (TR at 127).

Referring to the OSHA complaint that was filed at CX 24, the Complainant testified that the complaint was written by his attorney at the time it was filed based on his conversations with that attorney. The Complainant testified that on the page marked CSX000427, the paragraph beginning "I was upset because…" contains a description of his conversation with T. Thornton whereas the paragraph beginning "The solution to this problem…" is not a part of his conversation with T. Thornton on June 11, 2011, but would be solutions to the problems he identified to T. Thornton that he discussed with his attorney to keep the problems from happening again. He did not discuss these suggested solutions to the problems with T. Thornton. (TR at 129).

The Complainant testified that prior to the meeting with B. Bennett, in which he found out about the GR-2 charge, he had not had any disagreements or problems with B. Bennett. The Complainant testified that they had met socially outside of work before and that these interactions were kind and polite. However, the Complainant testified that his opinion of B. Bennett changed after the meeting because, "I didn't really like the fact that he seemed to be, I guess, fabricating the incident that happened between me and Ms. Thornton…that was not the way that it happened. I think it was a retaliation thing and I'm assuming that [Mr.] Bennett was basically in charge of Waycross Yard and the proceedings and who gets charged with what." (TR at 130).

The Complainant identified the letter at CX 15 as the letter dismissing the Complainant from service. The Complainant testified that between the June 15, 2011, meeting with B. Bennett and the August 3, 2011, termination letter, he was scared and frightened for his job. He stated that "you're not as concerned about maybe what they do for safety because you're not going to be there and so you're doing everything you possibly can to keep your job." (TR at 131). The Complainant testified that he felt scared, intimidated, and harassed, and that he was "really scared to [bring any other safety issues to light] because at any time, they [the Respondent] could always rule that they're not going to fire you over something. I mean the ball is kind of in [the Respondent's] court to make a decision on terminating you. So, I tried to walk on thin ice and basically just didn't bring up any issues or concerns at all." (TR 131-132).

Referring to the Employee History of Mr. Mark Middleton at CX 16, the Complainant testified that he knew Mr. Middleton from working at the yard in Waycross. The Complainant testified that he knew Mr. Middleton to use profanity "about the same as everybody else." (TR at 138). The Complainant testified that T. Thornton was Mr. Middleton's supervisor in November of 2011. He also testified that "IRC" is discipline for minor offenses in the form of counseling. He testified it was his understanding that GR-2 prohibits the use of profanity.

The Complainant testified that he was devastated when he received the termination letter because he could not believe that the Respondent had reacted in such a harsh way in response to the use of profanity that is commonly used in the rail yard. He testified that he believed it was in direct retaliation "for the fact of me wanting to make some changes in the Waycross yard concerning

safety and bring up those issues." (TR at 132). The Complainant testified that being terminated changed his life because of loss of income and loss of friendship with his former co-workers. He testified that being terminated caused him financial stress and that "being labeled…as somebody that's ugly, somebody that's irate definitely made a difference and an impact on where… I could apply for work." (TR at 133). He testified that "I felt like I spent years achieving a good thing in my hometown and I was not somebody who was labeled to be an ugly person, never been involved in any kind of ugliness whatsoever and for them to fire me for what they did and make the accusations and claims against me the way they did was just so wrong in my opinion and it was devastating." (TR at 133).

The Complainant testified that he currently lived with his father and that he used to have a river house that he used "like a secondary residence" where he would spend most of his time except when it would flood, though he had had his mail sent to his father's house because he worked at different locations and was frequently away from home. He testified that he no longer had the river house because he could not afford to keep it and had to live with his father full time. The Complainant testified that having to move in with his father was "embarrassing," "humiliating," and "down grading." He testified that the impact of being terminated has affected his health stating that before this incident he never had high blood pressure but that when getting a physical, he was informed that his blood pressure was "above the limits of what you're supposed to be able to get and renew your CDL license." (TR at 135). The Complainant stated that the stress and humiliation he described has affected him from the time of the termination through the time of the hearing.

The Complainant testified that for approximately a year following his termination he was trying to get his job back through the union arbitration process. He testified that he believed he would be successful. He testified that he did not work while awaiting the arbitrator's decision because "I hoped that it would be in my favor and I'd go right back to work when I drew basically my unemployment benefits and was waiting to hear a decision." (TR at 136). The Complainant testified that he began looking for a job when he learned that he was not going to get his job back. The Complainant testified that he also worked odd jobs during this time, "I did carpenter work, I did painting jobs, painter, carpenter, yard work, whatever I could find I did." (TR at 137). He testified that he eventually found a job with the owner of Thom's Transport, with whom his father was connected. He testified that the owner had inquired after his situation and told his father that he would "overlook more or less the way I was terminated and would give me a shot and he did and I've been working with him ever since." (TR at 137. The Complainant testified that because the Waycross and Blackshear, Georgia, area is a small community, "everybody knew about what happened…So, it was kind of hard to go get a job in a small community like that when you're labeled that kind of a person." (TR at 137).

Referring to the CX 26 at 1-2, the Complainant testified that the period of damages calculated is from August 4, 2011, the date of termination through October 31, 2014, which does not include the time period before termination during which the Complainant was removed from service. He testified that the projected earnings portion assumes a 3 percent increase per year because of increases mandated by the union contract and because increases in seniority make higher paying jobs available. He testified that the $65,000.00 figure represents what he would have made in 2011 if he had worked the whole year based on his W-2s from the Respondent. The

Complainant described his benefits package that included retirement, health insurance, prescription, optical, and dental benefits. He described the benefits as "super" and the medical insurance as of "great" quality. He testified that the premium was subsidized by the Respondent, which kept premiums low for the employees. The Complainant testified that he estimated the value of these benefits to be approximately 25% of his salary. The Complainant testified that his current employer does offer some healthcare benefits, which cost him $75.00 per week for more limited coverage. He testified that out of pocket expenses are much higher than they were under his benefits with the Respondent stating that "it's more expensive for less benefits." (TR at 143). He also testified that there is no retirement package or stock options with his new employer. The Complainant testified that this would be the case with any employer in the Waycross, Georgia, area because the area is so rural.

The Complainant testified that he accounted for the benefits he does receive from his new employer, and estimated they were worth approximately 15% of his salary there, representing an approximately 10% reduction from his estimate of the value of his benefits with the Respondent. He testified that the reduction is "probably greater than that compared to the retirement program and me not having a retirement program at all where I work." (TR at 144). The Complainant testified that whereas he expected approximately $1,500.00 per month from Social Security upon retirement, whereas full retirement benefits with the Respondent would be approximately $3,300.00 per month and fifty percent more than that if married. He testified that his new employer has no 401(k) plan or any matching program whatsoever, so over the long run he believed the actual reduction in value of his benefits package from the Respondent to the new employer would be greater than the 10% assumed in the benefits calculations at CX 26, and that it was a conservative estimate of his damages. The Complainant testified that he did not personally prepare the chart at CX 26, his attorney did.

The Complainant testified that he is seeking to be reinstated to his old job with the Respondent at the level of seniority he would have had had he not been terminated. He also testified that he incurred expenses that he would not have incurred had he continued working for the Respondent. He stated that in his current job he has to live in the truck so he has to eat out, pay for laundry and showers. The Complainant explained that it is "impossible" to provide himself with food in his truck for five or six days in a row. He stated that "every now and then I do pay for a motel room just to get a break from outside of the truck." (TR at147). The Complainant testified that his employer does not cover any of these expenses. The Complainant compared this with his work for the Respondent in which he stated that normally he went home every day and that he might go to a motel on a road job, but that it would only be for one night. The Complainant testified that the expenses he described total about $50.00 per day in "eating out and washing clothes" and that these expenses have been incurred for all of his employment with the new employer except for one month when he was part of the training program.

On cross-examination, the Complainant testified that he only worked at the Waycross yard during the first six months and the last six months of his employment and that he was employed elsewhere the rest of the time. The Complainant reiterated his earlier testimony that the work environment in the yard is unforgiving and dangerous and testified that following safety rules is an important part of working there. The Complainant testified that he knew he had to comply with safety rules and that he received regular training in those rules. The Complainant agreed

that safety was stressed by the Respondent and testified that doing the job in a safe way "is the main motto that we try to work as safely as possible." (TR at 156). The Complainant testified that under certain circumstances, employees were permitted to challenge what they were asked to do by managers if they considered it unsafe, but that "they can also get you for like delaying a train." (TR at 156). The Complainant testified that he was never disciplined for delaying production. He testified that no one ever told him directly to work so fast as to compromise safety, but that there was sometimes pressure from the yardmasters to hurry and finish with a track. He testified that yardmasters are not managers and that he did not think they could assign discipline, but that they assigned work. The Complainant testified that he was never disciplined for taking a little bit longer or working more slowly to couple cars in a track.

The Complainant testified that prior to starting to couple on Track B46 on the day of the sideswipe, the yardmaster told him the track was full. When asked whether that meant that there was 250 feet left at the end of the track, the Complainant testified that it meant there should be about five to six cars of room at the end, but that sometimes tacks have gaps in them, which he may not know on the ground. The Complainant testified that he knew that he had to work carefully because the track was full, whereas in a less full track, depending on the cars' positions on the track, he could have coupled at 4 miles per hour. The Complainant testified that he coupled at around 1.4 miles per hour that day because the cars were auto racks, which can require conductors to physically get in between the cars to couple properly. The Complainant testified that the Respondent has rules regarding how much space is supposed to be left in between cars and settings referred to as "three point protection" to protect conductors when they are working between cars.

The Complainant testified that he was not sure exactly when the sideswipe happened but that based on the engine downloads and the time the damaged cars rolled down the hump, he believes he was approximately six cars from the end of the track. He testified that the cars were auto racks, which are 90- 120 feet long. He reiterated his testimony that the first time he noticed something wrong was when he was taking the cars he had assembled out of the bowl. He testified that the cars were moving already when he heard the dragging sound, that he investigated and found the handbrake dragging, and that he reported it to the yardmaster. The Complainant testified that while some damage on cars is pretty common, such as little dents, but that something dragging had to be reported and "bad ordered." (TR at 168). The Complainant testified that the Respondent has a department for inspecting and fixing cars. He testified that he was instructed by the yardmaster to uncouple the damaged car, leave it on the track, and continue with moving the cut of cars to the forwarding yard. He testified that he did so, leaving the damaged car in the clear on the A-Tower side of the retarders.

The Complainant testified that when he came in on Monday June 6 for the safety day, it was his understanding that he was available to help with any investigation into the sideswipe incident. He testified that he was not sure if he was paid for that day but that most of the time the Respondent paid for safety days or meetings. He testified that he spoke with T. Thornton but that most of that day he sat around because they did not have a lot of questions to ask him. He testified that he also spoke with B. Bennett that day and that B. Bennett asked him to write a statement as he testified on direct examination. The Complainant testified that B. Bennett asked him to write the statement to let D. Jones know that he "wasn't aware that it happened and that if

I had known, I would have reported it and stopped working and done the proper things." (TR at 174). The Complainant testified that this statement was true and that he did not take issue with being asked to put it in the written statement. The Complainant testified that he did not mention any safety issues to B. Bennett and that B. Bennett did not discourage him or ask him to leave any safety concerns out of his statement. The Complainant testified that he did not include any safety concerns in his written statement to D. Jones.

The Complainant testified that he was off from work on funeral leave between June 6 and June 11, and that he was not taken out of service at that point. The Complainant testified that when he returned on June 11, he heard some unusual radio communications before starting to work. He testified that he heard statements regarding car lengths of room left on tracks that "hadn't happened before so it kind of struck him as odd." (TR at 176). Referring to CX 18 at the page marked CSX002185, the Complainant testified that he had not seen this bulletin before talking with T. Thornton because pulling bulletins happens at the beginning of the shift and his shift had not yet started. The Complainant testified that a track to be blocked means that cars cannot come into the track, but that he was not sure if that kept cars from coming out of the track.

The Complainant testified that he did not have any issues with T. Thornton prior to his interaction with her on June 11, 2011, though he only had limited experience working with her having only been working in the Waycross yard for six months. The Complainant testified that he attending the investigatory hearing into the GR-2 violation and that while he acknowledged in his own testimony that he used the word "bullshit" he disagreed with T. Thornton's investigatory hearing testimony that he used the phrase "fucking bullshit" in speaking with her. (TR at 181). He testified that he used the word "bullshit" because he believed that a Rule 103 charge was unfair and because he felt that there were safety issues that needed to be addressed "outside of just blaming the person on the ground who can't be at both ends of the track at one time." (TR at 182). The Complainant testified that at that time he still believed the Respondent needed to address safety issues. He testified that while he had heard the unusual radio communications that morning, he did not know all of the steps the Respondent had taken. He testified that he thought the Respondent had taken some steps to change things already because of the radio communications he hear. He testified that Rule 103 is a shoving move rule and that he was not shoving in a track, because the track was blocked out, which is why he thought the Rule 103 charge was unfair.

The Complainant testified that in his conversation with T. Thornton he used the words "shut down the yard" but he testified that, "I believe I used the words, 'You all just as well' or 'You all just as well shut the yard down.'" (TR at 184). He testified that he said this because he did not think there was any possible way for a person on the ground to fully protect the shove or to make a coupling and be able to determine what room there was on the other end. The Complainant agreed with Respondent's counsel's characterization of his version of events that he was essentially saying that "if I have to protect the shove, I'm going to have to walk all the way to the hump end of this track every time I do a coupling and then walk all the way back and that's going to take forever." (TR at 185). He also testified that there would be a loss of production because walking back and forth would take a long time. The Complainant testified that he was also trying to convey that,

> "we didn't want to get coupled in those tracks. It was a safety issue and the fact of if you're going to blame me and say that I'm responsible for that, then I have to think, oh, my gosh, I'm going to have to walk down there to prevent myself from possibly that happening and me being hurt or my co-workers being hurt. So, it wasn't just a fact of I'm responsible for it. It was also the safety issue of I could get hurt while this is taking place if I don't want and do that and keep it from happening."

(TR at 186). The Complainant testified that he generally recalled that in her testimony in the investigational hearing, T. Thornton disagreed with his version of events that included detail about walking up and down the tracks and having to slow down production. Referring to T. Thornton's investigational hearing testimony at CX 5 at the page marked CSX000196, the Complainant noted that she disagreed with his version of the content of their conversation.

The Complainant testified that he had never behaved in a "boisterous manner" toward T. Thornton or a manager of the Respondent but that he was "confused" and "upset" in his conversation with T. Thornton. (TR 189-190). He testified that he would not know why T. Thornton might not tell the truth about their conversation. He testified that Mr. Anthony Dixon was within about ten feet of himself and T. Thornton during the conversation, but that he was not paying close attention to exactly what Mr. A. Dixon was doing. The Complainant reiterated his testimony that after a few phone calls, he left work with T. Thornton's permission. He testified that he was initially marked as "sick" but later learned that he the mark was changed to "refusing to work," a change he disagreed with. The Complainant testified that while he did not agree with this label, he did not mention this issue in his OSHA complaint. The Complainant testified that he believed there was no difference in his pay between being marked as sick or as refusing to work and that he was never disciplined for refusing to work.

The Complainant testified that after he left work he spoke with his union representative, T. Riggins, while he was driving home and that he was still upset in this conversation. He testified that either T. Riggins or the union president suggested contacting a counselor because he was getting calls from T. Thornton and B. Bennett trying to get him to come back to work, which he did not want to deal with. The Complainant testified that he wanted T. Riggins to call them instead. He testified that either T. Riggins or the union president told him that a counselor was available to him if he wanted to talk with someone and that one of them provided the counselor's phone number. The Complainant testified that he called the number, spoke with someone that evening, and set up an appointment for the next week.

The Complainant testified that he received a message on his phone from B. Bennett asking him to call B. Bennett back. The Complainant testified that the union president discussed calling B. Bennett back. He recounted his discussion with the union president, "'according to Brian, you're not going to be like taken out of service or punished for this,' but they had to do it for whatever reason and that there was no need to file a report with the FRA or making a big issue about it, to more or less don't take it so seriously or whatever. " (TR at 197). The Complainant testified that the union president left the decision to return B. Bennett's phone call up to him. He testified that he did not want to call B. Bennett back that day because he was stressed and agreed with the suggestion that he was concerned with what he might say.

The Complainant testified that the only safety issues he raised with the Respondent were during his June 11 meeting with T. Thornton, but that he also filed a complaint with OSHA. He testified that at some point around the time he was informed there was a sideswipe incident, he could not recall if it was the day of the incident or the safety day following the incident, he told T. Thornton that he was thankful he had not been injured or that there had not been a chemical spill related to the sideswipe and that he considered this to be addressing a safety issue and concern. The Complainant testified that he did not raise any safety concerns with Messrs. Bennett, Jones, or Logan. The Complainant testified that the only dates on which he raised safety issues or concerns were June 5th or 6th and June 11th, both times in conversations with T. Thornton, and in the OSHA complaint, which was filed after he was dismissed by the Respondent. He testified that he did not raise any safety concerns with the Respondent in writing. The Complainant reiterated his testimony that he did not raise the issues of retarders or yellow cross ties and that he did not report the sideswipe to the Respondent because the Respondent reported it to him. He testified that he might have mentioned lighting in the bowl in relating to walking in the bowl or seeing the other engineers, but that he was not sure if he had because it had been so long since the conversation.

The Complainant testified that the incident resulting in a death in the bowl to which he referred in his conversation with T. Thornton was related to the death of a signal maintainer but that the incident did not relate to coupling cars but that he was not sure exactly how the worker was killed. Referring to the OSHA complaint at CX 24 at the page marked CSX000427, the Complainant testified that by the time this complaint was filed he was aware, based on different radio communications he overheard, that the Respondent had changed procedures in the bowl, but that he was not sure whether the Respondent was addressing safety concerns properly. The Complainant also testified that as of the time he left work on June 6, he did not know whether the sideswipe incident was "FRA reportable." (TR at 209). The Complainant testified that he assumed the Respondent had to report the incident but that he did not know the FRA requirements. He testified that he never contacted the FRA about the sideswipe incident and that he did not contact a lawyer about rights to an FRA investigation or anything else until after he was dismissed. The Complainant testified that he was not present for any conversations T. Thornton had with Messrs. Bennett, Jones, or Logan had regarding his interaction with her on June 11, and that he only knew what T. Thornton said about the interaction in her investigatory hearing testimony. He testified that B. Bennett's statement in the June 15 meeting regarding expecting a phone call to be returned, indicated to him that B. Bennett was angry about not being called back.

The Complainant testified that T. Riggins was his union representative at the investigatory hearing but that T. Riggins was new and that he had done the best he could, but that "[h]e really didn't know what he was doing." (TR at 213). The Complainant testified that he did not believe that the investigation process was fair and that he believed it was "one-sided." (TR at 214). He testified that he did not know whether the process complied "100%" with the requirements of the collective bargaining agreement because he did not know what they were, but that "[i]t probably did go along the lines of what they are supposed to do." (TR at 215). He testified that he was not allowed to ask certain things, but that he thought the arbitrator could see and review the objections that were made. The Complainant testified that he chose T. Riggins as a representative and that he could have chosen any one. The Complainant testified that his opinion

of B. Bennett changed after he was dismissed because he assumed B. Bennett played a role in the dismissal; however, he testified that he did not know how the decision was made or if B. Bennett played any role in the decision. The Complainant reviewed his direct testimony relating to the suspension he received while working in Baltimore. He testified that he had the right to go to an investigation hearing but that he chose to accept responsibility and take a waiver in lieu of an investigation. He testified that though he was not questioned about the Baltimore suspension in his GR -2 investigatory hearing, he could have made statements about it on his own behalf.

The Complainant testified that though he had never heard an employee cuss at or cuss out a manager, he had heard employees use profanity in front of a manager. The Complainant testified that "I don't believe it's appropriate to really use the F word. I know some of them out there do it, but I don't like that word personally and I especially ever [sic] use it with a female." (TR at 220). The Complainant testified that while the phrase "that's bullshit" might be used commonly, that did not make it the best choice of words to use to a manager. The Complainant also agreed with Respondent's counsel that threatening to shut down the yard would not be appropriate.

Regarding the effect his dismissal had on his willingness to bring safety issues to light, the Complainant testified that he could have filed a report with the FRA but that he feared losing his job. But when it was clarified that the question related to the period after he was dismissed, the Complainant testified that

> "if I was working at T[h]om's and there was a safety issue, would I not bring it up? Is that what you're asking me? I don't think it hindered me from bringing up a safety issue, but it certainly might take your mind off of it if you're worried about all the other things that you got going on and the stress from all the other, you might not be thinking about safety as much as you would normally…"

(TR at 224). The Complainant also testified that there were a few former co-workers that he stayed in touch with, but that between shift work and being labeled an "ugly person" he believed he lost relationships as a result of losing his job with the Respondent. He testified that no one specifically told him that they would not be his friend anymore because of how he was dismissed. He testified that he found out about his blood pressure "much later" than when he was dismissed. The Complainant testified that he spoke with an "AEP person" three times between the June 11 incident and when he was dismissed, but that he did not seek counseling after he was dismissed. (TR at 225). He testified that after speaking with someone in AEP he felt somewhat better.

The Complainant testified that he did not look for work after being dismissed because he drew his unemployment benefits and hoped to be reinstated. He testified that after he realized he was not going to get his job back he went out and looked for jobs. The Complainant testified that he had been dismissed by the Respondent before but that he was reinstated by an arbitrator after about 18 months. He testified that he thought he would be reinstated again. The Complainant testified that between August 3, 2011, when he was dismissed, and May of 2012, when the arbitrator's ruling came in, he did not apply for any jobs. He testified that he believed his unemployment benefits lasted approximately one year and that he did not look for a job while he was collecting unemployment "because I was hoping to get back to work with the Labor Board."

(TR at 228). The Complainant testified that he was physically able to work during that time period and that he is qualified to work as a conductor.

Referring to the August 17, 2011, ad in the Waycross Journal-Herald at RX 53, the Complainant testified that he did not apply for any job at St. Mary's Railway in August of 2011. The Complainant testified that more than a year after he was fired he spoke with Mr. Bacon who worked for St. Mary's Railway about a job that they were offering in Waynesboro. He testified that the job was approximately 50 or 60 miles away from him. He testified that he assumed it was the same job as advertised in RX 53 because it was the same switchman conductor position with the same employer, but that he did not know. The Complainant testified that Mr. Bacon did not offer him the job a year later but stated that he could apply. The Complainant testified that Mr. Bacon discouraged his application because of the differences in pay, commuting distance, and type of work with a "short line" railroad. (TR at 231). "In other words, he was basically discouraging me from taking the job or putting in for it because of the low pay and my driving as far as it was." (TR at 232). The Complainant testified that Mr. Bacon did not state that he would not hire the Complainant, but that "we mainly looked at the financial part of it, how far it was from where I lived to where I was going to have to go to work." (TR at 231).

The Complainant testified that he would not have been qualified in August of 2011 to work as a truck driver because he did not have his certifications, his "CDLs" were not up to date, and his "medical stuff" had not yet been renewed. (TR at 232). He testified that he did have these things done while he was doing part time work. The Complainant testified that the owner of a hay farm that used to belong to his father did him a favor and paid for the certifications and exams. He testified that in return he would occasionally drive loads of hay for the farmer. He testified that he did this driving "mixed… in with my carpenter work and various jobs that I had." (TR at 232). The Complainant testified that there was not anything preventing him from getting his CDL certification in August of 2011 "except for the financial part of it maybe." The Complainant testified that he believed he drew unemployment at this time. Referring to RX 54, the Complainant testified that he was unaware that the Railroad Retirement Board published available jobs. He testified that he might have been qualified to work as a conductor at a railroad, but that it depended on the company's required qualifications. He also testified that, although he did not know because he did not apply, "I'm sure it would be detrimental to getting hired with any job if you're labeled as someone who acts irate, curses and acts irate and fired from a GR-2 violation, then perhaps it would hinder me from getting a job with another railroad." (TR at 235).

The Complainant testified that his being fired for a GR-2 violation did not hinder him from being hired by his current employer, Thom's Transport because "Mr. Darrell Thomas and them knew me and my dad very well and I think even thought the situation being what it was, they didn't believe [the Respondent] and they didn't believe the charges that are pending and they basically knew me all my life and said, 'You know, you can come work with us.'" (TR at 235).

The Complainant testified that since February of 2013 he makes between $700.00 and $900.00 per week, gross. He testified that he is on the road a lot, normally leaving on Sunday and not getting home until Friday or Saturday. He compared this to working in the yard in his last job and over the road jobs while he was in Baltimore. The Complainant testified that for over the

road jobs he would be out one night and back the next day, and then off until he was called in for another train.

On redirect examination the Complainant testified that he did not have the money, even with his unemployment benefits, to obtain his commercial driver's license and associated medical exams after he was terminated. He also testified that he had no health insurance after he was terminated and that he did not have money to pay for counseling after he was terminated.

The Complainant testified that it seemed to him that T. Thornton did not think the Rule 103 charge was fair and that she testified in her deposition consistent with that impression.

The Complainant reiterated his earlier testimony that the mention of retarders and yellow cross ties in the OSHA complaint was a suggestion of a solution to the problems he raised, not a description of his conversation with T. Thornton, and reiterated that he raised other safety concerns in his conversation with her. The Complainant testified that though his attorney wrote and filed the OSHA complaint on his behalf, none of the contents were wrong.

The Complainant described what he meant by being "upset" on Saturday, June 11, 2011. He stated that he was

> "confused more than anything. I'd been off work. I'd been through the investigation and scared that they – any time you're involved in some kind of accident like that, you kind of get through the investigation part of it, then I felt a big relief, I guess, that the investigation was over with and that they pretty much let me know, 'Fill this out. We didn't find you doing anything wrong.' Then I lost… a close friend so I guess I had time to put those two things behind me…. Then I came in Saturday morning and it was kind of like I was ready to get back to work to kind of put all that…behind you and then before I could even start the day, Ms. Thornton came up and told me of the rule violation and they were going to be charging me with something that I thought was obviously over with and so yes, I guess I was confused of why would they be coming back and trying to charge me with this and sad about it and still, I guess, mourning the loss of a friend."

(TR at 240-241). He testified that a sideswipe is a "very big" safety issue. The Complainant testified that when B. Bennett asked him to write the handwritten statement in evidence, he did not ask the Complainant to write down safety issues. He testified that he thought that B. Bennett asked him to write down what happened to satisfy D. Jones about the facts of the investigation, who could not understand how five cars could have been hit without the Complainant's knowledge and to assure D. Jones he would have stopped working and reported the sideswipe had he known about it. The Complainant testified that he believed he included the points that B. Bennett said he needed to put in and that when B. Bennett reviewed the statement he told the Complainant that he thought they were finished.

The Complainant testified that the "three-point protection" procedures he mentioned on cross examination do not prevent injury in the event of a sideswipe like he experienced on June 5, but the rule is a precaution to try to avoid injury. The Complainant testified that there were no retarders in June of 2011 in the Waycross bowl that would have prevented a car from rolling

back up toward the hump and fouling the switch line. The Complainant testified that employees can be disciplined if they do not follow certain safety rules.

Deposition of Complainant 1/9/2014 (RX 57)

The Complainant's deposition testimony was materially consistent on all relevant matters with his testimony at the hearing summarized above except as noted herein. Relevant subjects addressed only in deposition or inconsistent with hearing testimony are summarized below.

The Complainant testified that he was divorced and had been so for over twenty years. He testified that he had children, but all were adults and had been out of the house before August of 2011. He testified that only he and his father lived at his residence as of August of 2011. The Complainant testified that he has no other dependents except for his father who needs some assistance following a stroke.

The Complainant testified that he had never been convicted of any crimes, that he had possibly received traffic tickets related to speeding and seatbelt violations, and that he had pled to a DUI charge approximately twenty years prior but had not served any jail time.

When describing his current employment with Thom's, the Complainant testified that he worked "way over" 40 hours per week and that he made 40 cents per mile when hauling, but only 25 cents per mile when "deadheading" or driving with no cargo. The Complainant testified that he occasionally earns additional fees such as for "tarping," or having to cover the load with a tarp, which is a $25.00 fee and demurrage fee of $12 per hour for having to wait for his truck to get loaded or unloaded. The Complainant testified that he was due for a raise of a half-cent per mile when he had been at Thom's for a year and every six months after that. The Complainant testified that the $75.00 per week that he pays for benefits covers the medical, dental, and disability insurance he has.

When describing his work since the railroad before working for Thom's, the Complainant testified that he did odd jobs "mowing grass, cutting firewood, a few carpenter type jobs. I drove a truck part-time delivering hay….I did that part-time, you know, maybe one load a week or something like that." (RX 57 at 19). The Complainant testified that he found the work he did because "I know everybody in the town, so, you know, just running into people and different people knew that I was kind of willing to… mow yards or whatever…. I kind of put it out there…that I was willing to work." (RX 57 at 20). The Complainant testified that he earned around $200 or $225 per week, but that it varied. The Complainant testified that he started the odd jobs when he realized he "wasn't going to getting back to work as …quickly." (RX 57 at 20). He clarified that he started working odd jobs when his unemployment benefits ran out, which he estimated approximately a year, but he could not recall the months. The Complainant testified that he was paid in cash and had no records of his income during that period.

When testifying to his earnings with the Respondent, the Complainant explained that he estimated that "around $70,000 a year is usually -- a fair base figure" but he had not worked many full years and made less when he first started because of training. (RX 57 at 33). The

Complainant explained his level of seniority permitted him to hold the regular jobs of employees who were out on leave approximately fifty percent of the time between February of 2011 and his termination, the remainder of the time he was on the extra board. The Complainant explained that some weeks he would receive only the baseline guaranteed payment.
The Complainant testified that the safety hazard he reported with regard to the sideswipe incident was that while in between cars moving draw-heads a car coming down off the hump could "squish" a person between the cars. (RX 57 at 41).

The Complainant testified that he received training in the safety rules and operating rules regularly, noting that training on various subjects took place about once a month.

The Complainant testified that he believed the procedures announced in the safety bulletin that provided more room in a full track would have decreased the possibility of a sideswipe incident occurring.

The Complainant testified that his conversation with T. Thornton lasted approximately four to five minutes. When asked whether he used the term "shut the yard down" in his conversation with T. Thornton, the Complainant testified that he said, in detail, that,

> "if we had to walk back and to on all the tracks in each one that we coupled - - it's a production type job. They want you to get in there, get them together, and get them out. Well, if you've got to walk, after you couple each time, all the way to the other end of your track and walk back, you're killing 20 minutes each time you're doing that. We wouldn't be moving any cars. And that - - not that I would shut the yard down, but the fact of having to walk all these…tracks, we're not going to make any production, we're not going to be moving any cars, and they just - - the management just as well shut it down because we're not going to be moving anything. We're not going to be being productive."

(RX 57 at 124-125). The Complainant testified that he also told T. Thornton that he was worried about his co-workers and that he would talk with them and "let them know, hey, guys, I got wrote up for this and almost killed and you all need to start walking the tracks and…be careful." (RX 57 at 127). When asked if he threatened T. Thornton that he would slow down production, the Complainant testified that T. Thornton knew working this way would slow down production, "it's just a fact of if you have to work like that, it's automatically going to drastically cut production and slow things down." (RX 57 at 127).

When asked if he threatened to call an attorney, the Complainant testified that he did not threaten T. Thornton but that he told her that "I am still concerned that they haven't fixed the issue that's at hand. If they are wanting me to be responsible or do something, even trying to do what they want me to do or be responsible for, is not possible, is not possible. That we need to investigate this. That, you know, if you're putting the blame on me, you're not fixing the problem." (RX 57 at 128). The Complainant testified that because the Respondent charged him he believed that the Respondent was taking care of what the FRA required but would "keep doing things the way they are" and not address the underlying safety issue. (RX 57 at 129).

The Complainant testified that he specifically told T. Thornton that he would contact the FRA to make them aware of "what they're to do with the guys on the ground and make us responsible,

and that I felt like there was still a…huge safety concern there." (RX 57 at 143). The Complainant testified that he was aware that over a certain dollar amount of damage an incident was FRA reportable, but that he was not sure whether the incident was investigated by the FRA. The Complainant testified that he did not contact the FRA. The Complainant testified that he believed that T. Thornton told B. Bennett that he mentioned the FRA, but that he had not told anyone else about it himself. The Complainant testified that he believed T. Thornton told B. Bennett about him contacting the FRA because of B. Bennett's comments to T. Riggins that the Complainant did not need to "make a big deal of this." (RX 57 at 146).

The Complainant testified that J. Dixon was outside, approximately five feet from himself and T. Thornton for "approximately…a minute, minute and a half, two minutes. You know, maybe a third of the conversation to half of the conversation." (RX 57 at 147).

The Complainant testified that after his conversation with T. Thornton he tried to move on and go back to work "but I had it on [my] mind so strongly with it that I… didn't feel like I could actually perform my duties. Because…it's one of these jobs you really got to be on your toes more than some of the…others. And that's controlling all of the jobs that come up out of that bowl and how they're lined up and what they're doing. It's a job that you really have to be 100 percent mind on your job." (RX 57 at 148). The Complainant testified that he told T. Thornton that he thought it was unsafe for him to stay because he could not concentrate "and I was scared that I might make a mistake and cause… somebody to get hurt or something or line somebody up the wrong way." (RX 57 at 149). He testified that he agreed to try to wait for someone to relieve him but that he realized he could not wait for the relief to show up. The Complainant testified that he then called T. Thornton back and that she said it would be okay if J. Dixon covered his work and that the Complainant could go home, which he did. When asked whether he was disciplined in any way for refusing to work on June 11, 2011, the Complainant testified that he was not, that he was aware of.

The Complainant testified that he called T. Riggins the day after his conversation with T. Thornton to ask to set up a meeting with B. Bennett. The Complainant testified that he asked for this meeting because he was marked as refusing to work and he did not know when he could return to work under this designation. The Complainant testified that it was his understanding that after June 11, 2011, he was shown in the Respondent's computer system as not being available for work.

The Complainant testified that he did not discuss the safety issue with B. Bennett and that when B. Bennett informed him that he would be charged with a GR-2 violation and taken out of service pending investigation, he left the meeting.

When asked whether he believed that he was charged with a GR-2 violation because he raised a safety issue during his conversation with T. Thornton, the Complainant testified that he thought it was the entire reason. "I think [B. Bennett] didn't want me to make a big issue of this. He told both the local chairman and the president that I didn't need to make a big deal out of this, that I wasn't going to get any time off, and then when I did make a big deal or whatever out of it and said that I was going to try to get an investigation, you know, a further investigation or whatever, that's when this GR-2 thing came up." (RX 57 at 183).

When asked if he knew what B. Bennett was referring to when he said not to "make a big deal about it" the Complainant testified that he assumed B. Bennett "didn't want me to call the FRA, he didn't want me to…make any waves about it, to try to say, look, I still think that there's some safety issues." (RX 57 at 183-184). The Complainant testified that he made this assumption because of B. Bennett's conversation with T. Riggins and the general chairman, Mr. Aspinwall, "that it was just a little assessment failure, that I wasn't going to get any time off. So it wasn't a matter of me getting in trouble over this. It was a matter that I didn't feel like they had corrected the safety problem if they're blaming the conductor and making us responsible for that track being safe." (RX 57 at 184). The Complainant testified that he believed B. Bennett was referring to contacting the FRA because at first he was speaking with T. Riggins, his union representative, and then spoke to Mr. Aspinwall, the president of the local. The Complainant testified that Mr. Aspinwall told him that B. Bennett said "don't make a big issue of this, it's not a big deal. He had to put an assessment failure in it." (RX 57 at 185). The Complainant testified that he was not sure if B. Bennett meant not to make a big deal of the about the safety issue or about the assessment, but that he believed B. Bennett was referring to him contacting the FRA to request further investigation.

The Complainant testified that the GR-2 violation charge had something to do with what he said during his conversation with T. Thornton because he did not act inappropriately, did not raise his voice, "didn't act any of the way that they were claiming that I acted" and "because they changed what T. Thornton said. I mean, they - - that situation didn't go the way it said and what was said." (RX 57 at 186-187).

The complainant testified that he was familiar with rule GR-2. When asked whether he thought the term "bullshit" is profane language, the Complainant testified that the term is commonly used in the workplace and that he thought "profane language" meant "like, customers, cussing out customers, cussing someone out, that sort of thing because everybody out there uses profanity." (RX 57 at 191).

Referring to the termination letter summarized below at RX 19, the Complainant agreed that he understood from the letter that he would not be reinstated as a result of the internal appeal process. However, the Complainant testified that he did not know from that letter that he would not return to work because he had also filed a complaint with OSHA.

Referring to his OSHA complaint summarized below at RX 3, the Complainant testified that he believed that he would not have been fired if he had not maintained that he was going to ask for an FRA investigation because of what B. Bennett said about not making a big issue of this. The Complainant also cited T. Thornton's testimony, which he characterized as incorrect, as another indication that led him to assume that talking with T. Thornton about requesting an FRA investigation was the reason he was fired. The Complainant testified that the fact that the charge related to the sideswipe incident was entirely dropped and immediately followed by the charge for the GR-2 violation also led him to believe he was fired because he mentioned he was going to ask for an FRA investigation.

Referring to his disciplinary history summarized below at RX 1, the Complainant testified that he signed a waiver admitting that he committed a rule violation by traveling 32 miles per hour in a 10-mile-per-hour zone. He testified that he accepted a 45-day actual suspension for the rule violation. The Complainant testified that he had earlier been dismissed for attendance reasons but was reinstated after approximately 18 months without pay.
Referring to the damages calculation attached to the deposition as Exhibit 12, similar to CX 26 summarized below, the Complainant testified that he believed the dates are wrong because he last worked in June, rather than August, as the exhibit indicates. The Complainant testified that the 3% wage increase factored into the calculation of damages exhibit was a best guess made without the benefit of being able to consult the applicable collective bargaining agreement directly. (RX 57 at 270).

The Complainant testified that after his unemployment benefits ran out he went "to the unemployment office and … looked on their … employment list as to what jobs there were available, which was not a whole lot because the unemployment rate was horrible, and - - like I say, we were in a very depressed area. And then I did find some carpenter jobs and some oddball jobs, you know, that was keeping me pretty busy." (RX 57 at 246). The Complainant testified that he visited the unemployment office in Waycross "several times" and used their computer to see available jobs. He estimated that he went approximately 15 to 20 times to the unemployment office. The Complainant testified that he met with a lady in the office to see what jobs he was qualified for but that there "wasn't a whole lot of listed jobs that were available in what I was qualified for." (RX 57 at 247).

The Complainant testified that the St. Mary's Railroad job he looked into paid approximately $10.00 per hour. The Complainant testified that he also applied to the Rayonier paper mill in Jesup for work doing maintenance and upkeep. He testified that he believed he applied after the unemployment benefits ran out, though "it might have been right before they ran out, you know. When I'd hear of an opening or possibility of a decent job opening up, I'd go see about it." (RX 57 at 252). The Complainant testified that despite contacting the company several times after that to keep his application up to date, he never received a response.

Complainant's Testimony in the Investigational Hearing (CX 5, RX 14)

The Complainant's investigational hearing testimony was materially consistent on all relevant matters with his testimony at the hearing summarized above except as noted herein. Relevant subjects addressed only in the investigational hearing or inconsistent with hearing testimony are summarized below.

The Complainant summarized his conversation with T. Thornton materially consistently with the above summaries. However, he specifically stated that "if they're going to charge us with this and say that it's my fault that those cars came out the other end of the tracks then I'm going to have to walk down the track, I'm going to have to protect the other end of that shove. I can't be in two places at one time, T. [Thornton], down here working in the Bowl. I can't watch the knuckles, make sure they're lined up, and tell what's going to take place 2700 foot from me." (CX 5 at 28).

Testimony of James Dixon (TR 246-261)

J. Dixon testified that he was employed by the Respondent for almost ten years as a conductor and a yardmaster in Waycross, Georgia. He testified that he was familiar with how employees and managers talk with one another and that both employees and managers commonly use profanity at the Waycross yard. J. Dixon testified that he had heard employees and managers use the words, "bullshit" and "fuck" or "fucking." (TR at 248). He testified that the Complainant was the only person he was aware of ever having been disciplined for using profanity at Waycross.

J. Dixon testified that he was working on June 5, 2011, as the A Tower yardmaster. He testified that the Complainant was not responsible for loading cars onto track B46 and that the A Tower yardmaster is responsible for assigning cars to tracks. He testified that the Complainant, as a conductor, did not, that he was aware of, get a written list of the cars on the track on June 5, 2011. He testified that a utility employee in the B Tower has a list, but that on June 5, 2011, that the Complainant was not that utility employee. J. Dixon testified that he recalled that on the night of June 5, 2011, he thought there was a bad track circuit on the track that the Complainant was working because there was a light that would turn on for a few seconds and then turn back off. He testified that he did not investigate further. J. Dixon explained that the light he was describing turns on when there is a car possibly fouling the track. He testified that if the light was solid red several things can be done, but primarily the area is supposed to be blocked out to prevent sideswipes or roll outs.

J. Dixon testified that before June of 2011, for a car to come out of the bowl and foul the switch near the hump was "common enough that we knew how to deal with it. We were on the lookout for it. It wasn't something that happened every day." (TR at 251). J. Dixon testified that there was an alarm switch that was turned off on June 5, 2011. He testified that an audible alarm was supposed to go off when the track circuit light he described turned on, but that the alarm was turned off on that night. J. Dixon testified that in his time as a yardmaster he did not know the alarm was turned off because he had never heard it go off before. He explained that there were several "bells and whistles" that go off with the computer system and conjectured that the audible alarm was "just an aggravating noise." (TR at 252).

J. Dixon testified that he was not charged with any rule violation or disciplined in any way that he could recall in connection with the sideswipe incident. He testified that he did not see that the Complainant did anything wrong when he was coupling cars in track B46 and that he did not believe it was fair to charge the Complainant with a Rule 103 violation. J. Dixon testified that from his position in the A Tower he could see the eastern-most end of the bowl and the hump but that he could not see down into every track and that he would have to use monitors in the tower to operate.

On cross-examination, J. Dixon testified that he it was not common for employees to use profanity directed at a manager, but that there were certain managers "that we could joke around with." (TR at 254). When asked whether it was common for an employee to respond to a manager that something was "bullshit," J. Dixon testified that he had responded that way himself and that he was not joking. (TR at 255). When asked whether that manager reported it, J.

Dixon testified "Apparently not. I never got in trouble for it." (TR at 255). J. Dixon testified that "that is fucking bullshit" is "not a typical response." (TR at 255). J. Dixon testified that it was also not typical for employees to respond by threatening to shut down the yard.

J. Dixon testified that a yardmaster reports to trainmasters and does not have the ability to discipline employees. He testified that on June 5, 2011, the alarm indicating when a car was fouling a lead track was turned down but that he did not know, nor did he have reason to believe the Respondent knew, who turned the alarm down. J. Dixon testified that the superintendent and assistant to the superintendent asked every trainmaster, but could not find out who turned down the alarm.

J. Dixon testified that if one was more than halfway down track B46, it would be possible to see the end of the track and that if the adjacent tracks were empty, it would be possible to see the end of the track by stepping across the adjacent tracks, but that it was not possible to stand at one end of B46 and see from one end to the other. J. Dixon testified that from halfway down B46 it was probable that one could see the end of the track.

In response to a question from this presiding Judge, J. Dixon testified that the audible alarm only went off in the A Tower.

On redirect examination J. Dixon testified that one probably could not see from one end of the track to the other when it was dark out such as at 5:00 in the morning.

Deposition of J. Dixon, 1/29/2014 (RX 56)

J. Dixon testified by deposition on January 29, 2014. His deposition testimony relevant to the issues in this matter is summarized only to the extent it differs from his hearing testimony or is not contained in his hearing testimony summarized above.

J. Dixon testified that he was currently employed by the Respondent, that he had worked for the Respondent for about eight years, and that he had worked for another railroad company acquired by the Respondent for about six years before that. J. Dixon testified that he has been a train conductor for the eight years he had worked for the Respondent. He testified that he is a member of the United Transportation Union (UTU). Mr. Dixson testified that he had always worked at the Waycross yard in the time he worked for the Respondent. J. Dixon testified that he had worked various jobs for the Respondent, including working in the bowl, but that the jobs he worked changed week to week depending on seniority.

J. Dixon testified that at one point, T. Riggins was his local union representative, but that he was no longer the local representative. He testified that he had worked with T. Riggins since he started with the Respondent in 2006 but that he no longer worked with T. Riggins because T. Riggins' work as an engineer takes him out on the road. J. Dixon testified that he knew the Complainant from working for the Respondent, but that he could not remember when the Complainant started working for the Respondent. J. Dixon testified that his relationship with the Complainant at the time when he was still employed by the Respondent was good. J. Dixon testified that he worked with the Complainant only occasionally because of the varied work

schedules due to the seniority system; he estimated it was approximately one week per month. J. Dixon testified that when he and the Complainant worked together, they did not work a job together but were working in the same area and that they were friendly but did not socialize outside of work. J. Dixon testified that the last time he had spoken to the Complainant was on the date of the investigational hearing. J. Dixon testified that he had also known B. Bennett since he became superintendent of the Waycross Yard.

When asked if he had ever raised a safety issue with B. Bennett, J. Dixon testified that he had once reported a strong odor coming from a dead animal to B. Bennett. J. Dixon testified that the Complainant was working for the Respondent at the time he made this report. When asked whether he considered his report to be a potential safety concern, J. Dixon testified that at the time he made the report of the odor, he did not know its source and was concerned that it might be a chemical spill. J. Dixon testified that the report was made by calling the A-Tower, which relayed the information to B. Bennett as he had expected them to do. J. Dixon testified that he did not have any concern about his report being relayed to B. Bennett. J. Dixon testified that he also reported switches that needed to be greased, and other minor issues, but no other safety concerns that he could recall. J. Dixon testified that he had never been involved in an FRA reportable incident. He testified that as a manager, B. Bennett was concerned about safety.

J. Dixon testified that he knew and worked with T. Thornton before she retired. He testified that they worked together approximately three weeks per month. He testified that as a manger she was experienced, knowledgeable, and concerned with the safety of employees. J. Dixon testified that he had met D. Jones, the Division Manager, on more than one occasion when he visited the Rice Yard for various employee celebrations and events. J. Dixon testified that D. Jones was a good division manager and that he cared a lot about addressing employees' safety complaints.

J. Dixon testified that he was familiar with the Respondent's operating rules and had received regular training. He testified that he knew that the Respondent's operating rules prohibited employees from using profane language in GR-2. He testified that profanity was used on a regular basis, "not on the radio, but, you know, social speaking…guys talking about things that happened to them…it's not vulgar profanity, but, you know, certain words that's common." (RX 56 at 27). He testified that profanity was used informally, when employees were talking to each other. He testified that he had not heard an employee use profanity when talking to managers during his time working for the Respondent, nor had he heard managers use profanity. He testified that other than "rumored wise" about the Complainant, he had not heard of an employee being charged with a rule violation for using profanity. (RX 56 at 28).

J. Dixon testified that he was working the night of June 5, 2011, when the sideswipe incident involving the Complainant occurred. J. Dixon testified that he recalled hearing the A-Tower yardmaster say that some cars were hit coming off the hump on the A-Tower side. J. Dixon testified that on the day of the sideswipe incident he had been working approximately six to eight tracks from the Complainant. When asked whether it was his understanding that the Complainant was partially to blame for the incident, J. Dixon testified that he understood from talking to the Complainant initially that he would not be charged, "and then later, things came back that they were going to have a hearing on it," but then testified that he had not discussed the

incident with the Complainant. (RX 56 at 32). J. Dixon testified that he was somewhat familiar with Rule 103, regarding protecting the shove, and that when working in the bowl one is responsible for complying with Rule 103. J. Dixon testified that the rule requires ensuring there is adequate space to move cars, and that the yardmaster advises how much room is available at the end of the track. He testified that when the track is full "you're supposed to make sure that nothing rolls out the back…by supposedly positioning yourself in a way where about you can tell whether or not you have that room to make…that couple." (RX 56 at 35). He testified that to do this, a conductor is supposed to be able to see the last car in the track.

J. Dixon testified that he had heard through rumor and word of mouth that the Complainant had been terminated because he was accused of "pointing his finger at Trainmaster Terri Thornton and using profane language." (RX 56 at 37). J. Dixon testified that he was aware of a meeting between T. Thornton and the Complainant on June 11, 2011. He testified that he was in the B-Tower break room that morning and that T. Thornton asked to speak with the Complainant outside. J. Dixon testified that he was standing in front of a counter with three four-by-four windows studying a work order before his shift ended. He testified that he was facing the window. When asked whether he observed anything after T. Thornton and the Complainant went outside, J. Dixon stated,

> Not directly as soon as they went outside. They were, like, on the corner of the building right-hand corner of the building speaking, and then whatever she told [the Complainant] he started pacing back towards the window and that's when I heard him say that this is not fair to me, this is not right what they're doing. And that was, typically [sic], what all I've heard him say, and then he paced back towards her and she was discussing some more things with him.

(RX 56 at 42). J. Dixon testified that he was alone in the break room during this incident. He testified that the Complainant was outside with T. Thornton "anywhere from five to ten minutes" before he started pacing. (RX 56 at 42). He testified that before the Complainant started pacing, he did not have a clear view of the Complainant and T. Thornton. He testified that he could not hear anything that was said between the two "because it was, more or less, low key, low tone and whatever they were discussing you know, you had to actually be outside with them to hear it." (RX 56 at 43).

J. Dixon testified that he was not in the break room the entire period that the Complainant and T. Thornton were meeting. He testified that he went to his locker, and when he returned they were finished. He testified that the Complainant had returned to the room, that he asked the Complainant what was wrong, and that the Complainant told him what was discussed. J. Dixon testified that the Complainant reported the conversation with T. Thornton had him confused and that he would not be able to work the rest of the day. J. Dixon testified that he was present when the Complainant informed management that he had a lot on his mind following that conversation and that he did not want to injure himself or anybody else by not being focused. J. Dixon testified that management then asked him to work the Complainant's position until a relief could come in, which he did.

J. Dixon reiterated that the Complainant began pacing five to ten minutes after he had gone outside with T. Thornton. He testified that he was still in the break room at that time. He

reiterated that he heard the Complainant's remarks as summarized above but that he did not hear the Complainant say anything else "because after he said that, that's when he, more or less, started pacing back towards her, and, of course, the voice volume went down and I couldn't hear a thing." (RX 56 at 45-46). J. Dixon testified that he did not hear anything T. Thornton said to the Complainant. He testified that at no point while T. Thornton and the Complainant were meeting was he outside. J. Dixon testified that the Complainant testified that the conversation lasted approximately 20 minutes. J. Dixon testified that he looked up from the work order he was studying when he heard the Complainant speaking, "I looked up, and saw him, and go, like, something is wrong. But then I guess she either motioned for him to come back over and they were talking, but he paced himself back towards her and that's when the volume went down and I couldn't hear anything." (RX 56 at 47). J. Dixon testified that the Complainant did not appear upset to him. He testified that he did not know until later to what the Complainant was referring when he said "this is not fair." (RX 56 at 47). He testified that he was not exclusively focused on what the Complainant and T. Thornton were doing. J. Dixon testified that there is a door from the break room to outside where the Complainant and T. Thornton were talking, but that it was closed while they were talking and that he did not hear anything T. Thornton said. J. Dixon testified that the Complainant was about six feet from the window when he saw the Complainant pacing.

J. Dixon testified that after he left the break room to get gloves, and that the Complainant was in the break room when he returned. He testified that he and the Complainant then had a brief conversation. J. Dixon testified that, the Complainant "basically told me that the - - that he wasn't focused on his job because he was confused about was told to him and that he had informed management that they were going to have to excuse him for the rest of the day." (RX 56 at 49). J. Dixon testified that management then asked him to cover the Complainant's position until a relief could be called in to replace the Complainant. J. Dixon testified that the Complainant did not tell him immediately what T. Thornton had said, but "later on that day you can hear the rumor of what was said, that now they're going to have a hearing on the sideswipe." (RX 56 at 50). J. Dixon testified that he did not hear from the Complainant that there would be a hearing on the sideswipe. When asked whether the Complainant was upset, J. Dixon testified that the Complainant seemed confused during their conversation in the break room, that he did not know what to do next, and that he could not focus, but that he was calm. J. Dixon testified that he did not have any conversations with anyone about the Complainant's meeting with T. Thornton that day.

J. Dixon testified that it was possible that the Complainant could have raised his voice in the meeting with T. Thornton and that he would not have heard it because the meeting was outside. J. Dixon also testified that it was possible the Complainant used profanity during the conversation with T. Thornton and that he would not have heard it. J. Dixon testified that the Complainant was directly in front of him for approximately ten seconds out of the approximately twenty-minute meeting with T. Thornton. J. Dixon testified that he heard rumors that the Complainant was charged with a rule violation in relation to the June 11, 2011, meeting with T. Thornton from other trainmen. He testified that he had not spoken to any Respondent managers about the charges.

J. Dixon testified that he testified at the investigational hearing at the Complainant's request. J. Dixon explained his investigational hearing testimony stating that at no point did he go outside during the Complainant's meeting with T. Thornton.

J. Dixon testified that he initially heard the Complainant was "going to get some time off because of the violation of the rule violation," referring to the Rule 103 violation, but that he later heard the Complainant was fired. He testified that after the hearing, T. Riggins thanked him and that he had not spoken to the Complainant since the hearing. J. Dixon testified that he initially did not know why the Complainant was fired until he later heard the rumor that the Complainant was fired about "the abusive language … and the threats" to shut the railroad down. (RX 56 at 61). J. Dixon testified that he was not aware of any safety issues that the Complainant had raised. J. Dixon testified that he did not have any reason to believe that the Respondent terminated the Complainant's employment because he complained about a safety issue. J. Dixon testified that he had not heard the Complainant suggest to anyone at the Respondent that he was going to contact the FRA about the sideswipe incident and that the Complainant had not told him he was going to contact the FRA. J. Dixon testified that he did not know if the Respondent would have fired the Complainant if the Complainant had said he would talk to the FRA.

On cross examination J. Dixon testified that the July 6, 2011, hearing was a little over a month after the incident with T. Thornton and that he told the truth at the hearing. J. Dixon testified that he had not had a chance to review his hearing testimony before this deposition. When asked whether his "memory of what [he] observed in the conversation between [T. Thornton] and [the Complainant] on June 11th was … fresher on July 6th 2011" than on the morning of his deposition, J. Dixon testified that it was. Referring to page 34 of the investigational hearing transcript, J. Dixon described the window in front of the printer where he observed the meeting between the Complainant and T. Thornton and stated that "if the noise is right" it was possible to hear noise through the window. J. Dixon testified that when he heard the brief statement by the Complainant during his meeting with T. Thornton, the Complainant was speaking at a conversational tone and not raising his voice. J. Dixon testified that he never heard the Complainant yell, raise his voice, use profanity, or make any physical gestures toward T. Thornton. J. Dixon testified that he was not sure whether it would have been possible for him to hear the Complainant raise his voice if he were not directly in front of the window.

J. Dixon clarified his hearing testimony at page 35 of the transcript regarding whether he went outside during the conversation between the Complainant and T. Thornton. He testified that what he meant when he stated that he was checking the list against the serial numbers of the train that went by was that "I went out of the range of that window is what I was talking-- what I was trying to convey to him." (RX 56 at 74). J. Dixon then described the area outside the door from the break room and described where the Complainant and T. Thornton were standing during their conversation. J. Dixon then testified that it was possible that he stepped outside, "but I'm pretty sure I was checking those lists from inside." (RX 56 at 76). He testified that it was possible that he could have been doing sort of a combination of checking the lists by looking through the window and by stepping outside to look at the trains and that he had forgotten since his hearing testimony. J. Dixon testified he believed that if the Complainant had been yelling at T. Thornton he probably would have heard it, if he had been standing at the window.

Reviewing his hearing testimony beginning at page 35 of the hearing transcript, J. Dixon testified that re-reading his testimony refreshed his memory and that the testimony he gave was true. Referring to page 36-37 of the hearing transcript, J. Dixon explained that the comment "must have been a short track" meant that the train was likely ten to fifteen cars long. J. Dixon explained his hearing testimony about whether he could see the Complainant and T. Thornton stating that "if you're moving about inside the [break]room" it was possible to see T. Thornton and the Complainant standing outside in the corner as he had described, and that he had been moving about doing his work. J. Dixon testified that he realized that the conversation the Complainant and T. Thornton were having was important and that he was not curious about it. J. Dixon testified that it was an unusual occurrence for T. Thornton to ask a conductor to step outside and speak privately.

J. Dixon reiterated that when the Complainant returned to the break room he looked concerned and confused. J. Dixon testified that the Complainant was not "raising his voice or hollering or throwing anything or using profanity when he came back in." (RX 56 at 89). J. Dixon testified that he had not heard anything T. Thornton said to the Complainant. He reiterated his testimony that the conversation took approximately twenty minutes.

J. Dixon agreed that the Complainant said that he was "so confused and concerned about what T. Thornton had told him that he thought it might not be safe for him to continue working that morning." (RX 56 at 90). J. Dixon testified that this conversation happened while he was present, and that it happened over the telephone. J. Dixon testified that he did not know with whom the Complainant was speaking. When asked whether the Complainant did the right thing, J. Dixon replied, "Oh yeah. I mean you have to…be focused out there because you got too much moving equipment not to be focused. It's easily to get hurt if you're not focused on your job and your work." (RX 56 at 91).

J. Dixon testified that he had never seen the Complainant be disrespectful toward anybody or act in a manner that he considered rude towards managers or his fellow employees. J. Dixon testified that he had never observed the Complainant raise his voice or be loud in an inappropriate way with other employees or managers. He testified that he had never heard the Complainant use profanity at the Waycross yard. He testified that while the use of profanity was common in the yard "especially when they're talking about things that's not pertaining to the job," but that he did not use profanity himself. (RX 56 at 93). J. Dixon testified that he had never seen any employee who was disciplined or terminated for using profanity. He testified that he had never heard managers use profanity at the Waycross yard.

J. Dixon testified that on the morning of the Complainant's meeting with T. Thornton, B. Bennett did not come down into the bowl area to talk with him or other employees about the Complainant and that he did not have any recollection of B. Bennett coming into the bowl to talk to himself or any other employees about the Complainant.

J. Dixon testified that he could not remember if there were any sideswipe incidents before the one he had testified about. J. Dixon testified that the procedure he described, involving calling the tower to find out how many feet are left in the track, had always been in place. He testified

that the tower gave the amount of space in feet, not car lengths. J. Dixon testified that he believed that a sideswipe issue in the Waycross yard is a safety issue because it would cause equipment damage and could cause injury.

J. Dixon reiterated his testimony that his memory of the events of June 11 were more fresh on July 6th, 2011, than the day of the deposition. J. Dixon also testified that his testimony at the July 6, 2011, hearing was truthful.

Testimony of J. Dixon in Investigational Hearing (CX 5, RX 14)

J. Dixon testified in the investigational hearing on July 6, 2011. His testimony relevant to the issues in this matter is summarized only to the extent it differs from his hearing testimony or is not contained in his hearing testimony summarized above.

J. Dixon testified that he did not hear the whole conversation between the Complainant and T. Thornton. J. Dixon testified that he stepped outside in the course of his work about one to three minutes into the conversation and could hear the Complainant's tone of voice. He testified that the Complainant was not irate, cursing, or carrying on. J. Dixon testified that he did not see the Complainant point his finger at or gesture at T. Thornton the entire time he observed the conversation. J. Dixon testified that he did not hear the Complainant threaten to shut the yard down and that all he heard was the Complainant told T. Thornton, "this is not right, this is not fair to me." (CX 5 at 34).

J. Dixon testified that from his position in the break room when he went back inside he could see T. Thornton and the Complainant and that he was able to look out during the whole conversation. He testified that during this time he did not observe the Complainant acting irate or waving his arms in a way that would indicate the Complainant was acting inappropriately. J. Dixon testified that he did not hear the Complainant carrying on or acting unprofessionally from inside the break room. He stated that the Complainant and T. Thornton appeared to be just "conversating back and forth." (CX 5 at 34). J. Dixon testified that when the Complainant returned to the break room his manner was confused or disconcerted, but not unprofessional or irate.

Testimony of Brian Bennett (TR 268-383)

B. Bennett testified that he was currently employed by the Respondent and that he had been for fourteen years. He testified that he knew the Complainant from working for the Respondent and that the Complainant began working at the Rice Yard sometime around March of 2011. B. Bennett testified that he did not know the Complainant before he started working at the Rice Yard.

B. Bennett testified that he was the terminal superintendent and that he had five direct reports who were managers- the assistant superintendent and four trainmasters reporting to him. He testified that these managers supervised yardmasters, clerks, and "RTM" employees. He testified that a yardmaster is a contract supervisor who is considered a supervisor but not a manager. B. Bennett testified that a supervisor has control and makes decisions regarding

operations but they are union employees governed by the contract, whereas managers are company officers. B. Bennett testified that when he was terminal superintendent on average 25 to 30 trains arrived per day and approximately the same number departed per day. He testified that the trains operate on a schedule and that it is important to stick to that schedule in order to deliver on their customer commitments. He testified that delays at the Rice Yard could cause delays at the next destination and ultimately delays to the customer.
B. Bennett testified that the Rice Yard is a "hump classification" yard. (TR at 271). He explained that a hump classification yard uses gravity to propel cars from the hump down into the bowl and that the cars are directed through a series of retarders and switches to the proper tracks. He explained that the tracks that run from the top of the hump to the bowl are called leads, that there are a few primary leads of the hump, and that the south lead goes to tracks 33 through 64 in the bowl. Referring to RX27 at 6, B. Bennett testified that the picture accurately reflects the positions of tracks B46 and B48 in the bowl of the Waycross Yard. He testified that the hump was not in the picture but that a car traveling from the hump would pass track B46 to reach track B48. He testified that there is an automatic system that is controlled by the yardmaster that feeds the cars to the appropriate track.

B. Bennett testified that once a car arrives in the bowl, the A-Tower and B-Tower yardmasters communicate to ultimately get trains built. He testified that a conductor performs the jobs in the bowl to build the trains by coupling the cars on the track together. B. Bennett testified that in the Rice Yard, cars are coupled using a locomotive operated by a conductor in the bowl using a remote control. He testified that the cars being coupled can move in response to being pushed by the locomotive. He testified that the cars would move away from the locomotive if they were struck and a coupling was not made. He testified that generally when coupling in the bowl the cars would generally move east, in the direction of the hump.

B. Bennett testified that he learned on June 5, 2011, that equipment had been damaged at the Rice Yard because he was notified by one of his trainmasters, T. Thornton. B. Bennett testified that he told T. Thornton to have the mechanical department determine the amount of damage done to the damaged car that was left in the yard. B. Bennett testified that it was important to find out how the car was damaged so that they could implement procedures to prevent it from happening again. B. Bennett testified that certain incidents of property damage have to be reported to the FRA. B. Bennett testified that in 2011, incidents resulting in over $9,500.00 of property damage had to be reported to the FRA. He testified that four cars being humped down to track B48 sideswiped the car from track B46, which was an "auto rack" car. B. Bennett testified that auto racks are approximately 90 feet long whereas general freight cars are approximately 50 feet long, though they vary in length. He testified that the four other cars that were damaged on track B48 were reported as damaged by the conductor working the job.

B. Bennett testified that he was personally involved in the investigation into the sideswipe incident and that as the terminal supervisor he was responsible for enacting procedure to prevent the incident from happening again. B. Bennett testified that the local Waycross TAPs (Train Accident Prevention) Team investigated the sideswipe incident. He testified that he was a member of the TAPs Team as was a trainmaster, possibly T. Thornton, and a leader each from the Mechanical, Transportation, and Signals departments. He testified the investigation lasted a week and included examining the physical damage, reviewing the signal logs, and reviewing the

download from the locomotive. Referring to RX 29, B. Bennett testified that the diagram was an accurate depiction of how he understood the accident to have occurred, although he noted a discrepancy in the labeling of the tracks stating that track B48 would actually appear beneath track B46 in this diagram.

B. Bennett testified that on the morning on June 5, 2011, he believed the property damaged in the sideswipe exceeded the FRA report threshold based on preliminary reports from investigators. He testified that the team initially knew that the Complainant was coupling on track B46 and had knocked cars into track B48. Referring to RX 39 at 6, B. Bennett explained that "fouling" other tracks means to put equipment in a position that compromises the operation of another track. He testified that it is important to avoid fouling a track without permission because that could cause an accident. B. Bennett testified that Rule 103 requires that a qualified employee must be located on or ahead of the lead movement except when an employee can make a visual determination that there is sufficient room on the track to contain the equipment being moved, there are no conflicting movements, intervening switches are properly aligned, and there are no intervening road crossings. He testified that the leading end of the movement is the first car in the direction in which the train is moving, meaning that if the equipment were moving east the leading end would be the east-most car. B. Bennett testified that the determination that there is sufficient room for the movement can be made visually, "or there may be some other procedures that you can follow." (TR at 287-288).

B. Bennett testified that initially the TAPs Team believed there was a "strong possibility" that the sideswipe was a "human factor" incident, or an incident in which someone has broken a rule that contributed to the accident's occurrence. (TR at 288). He testified that the Respondent records the cause of accidents resulting in property damage by the TAPs team entering a cause code. He explained that the purpose of cause codes is to "accurately label the true cause of the incident" and that the preliminary cause code assigned to the sideswipe was H301, meaning something along the lines of "absence of someone protecting a shove move." (TR at 288-289). B. Bennett testified that he investigated whether the Complainant bore any responsibility for the sideswipe. He testified that the team reviewed the locomotive download and signal logs, obtained a statement from the Complainant, and interviewed other people working in the night of the accident. B. Bennett testified that based on his review of the locomotive download on Monday, June 6, he and the foreman who is the expert on downloads determined that they did not see any excessive or erratic actions by the Complainant. However, he testified that this information did not exonerate the Complainant because of the requirements of Rule 103.

B. Bennett testified that he met with the Complainant on Monday, June 6, in his office. He testified that he explained to the Complainant that the download looked good but that he "may still have a dog in this fight," meaning that the Complainant might still bear some responsibility and that the Respondent might still have additional things to look at. (TR at 291). B. Bennett testified that the Complainant's written statement is consistent with what the Complainant told him about the sideswipe incident. D. Bennett testified that he instructed the Complainant to include in the written statement what he had told B. Bennett. B. Bennett testified that he did not discourage the Complainant from including anything in the written statement.

B. Bennett testified that he understood that the yardmaster told the Complainant that the track was full before he started coupling and that this fact was significant because "obviously when there's no other room in the track, it takes a lot of effort to make sure the cars aren't knock out the other end and that's going back to Rule 103." (TR at 293). B. Bennett testified that in order to make certain cars did not get knocked out of the track, the Complainant would have had to walk to the east end of the track.

B. Bennett stated that the Complainant did not say anything in his statement that led him to believe the Complainant would contact the FRA, nor was he concerned the Complainant would do so because "we were the one leading this investigation. We came to [the Complainant] with this incident that he was not aware of…I have no problem with any of our employees contacting the FRA any time." (TR at 294). B. Bennett testified that as terminal superintendent he was in contact with the FRA "a lot" and that they discuss many issues including reports of safety issues, operational test results the union might not approve of, FRA inspections, etc. Referring to RX 5, B. Bennett testified that this e-mail confirmed his initial suspicion that the incident would be FRA reportable.

B. Bennett testified that procedures were immediately enacted to prevent a sideswipe from happening and that a general bulletin implementing those measures was issued on Monday, June 6. Referring to RX 32, B. Bennett testified that the bulletin went to all "T and E employees that operate in Rice Yard or on the outside of Rice Yard that may come into the yard." (TR at 297). He testified that employees would be notified of this bulletin because "they have to pull these up at the beginning of each tour of duty and they have to read and understand the bulletins that are out." (TR at 298). B. Bennett testified that members of the TAPs Team, including himself, determined the procedures included in the bulletin and that none of these procedures were in place on the day of the sideswipe. B. Bennett testified that this bulletin required blocking out a track that might be affected by a car being knocked out. "In other words, if you're in Track B46 and you have a potential of knocking a car out onto the lead, then we need to block out tracks maybe 47, 48, maybe even a lead track to ensure that cars are not sideswiped." (TR at 299). He testified that this procedure had the potential to slow down production, but that he was concerned with making sure that such an incident did not happen again. B. Bennett testified he believed the procedures in the June 6 bulletin would help prevent another sideswipe.

B. Bennett testified that the investigation into the incident continued even after his meeting with the Complainant on June 6, 2011. He testified that an assessment was entered against the Complainant, possibly on Friday of that week. B. Bennett testified that an assessment was entered because per the labor agreement applicable to the Complainant,

> "he has to be charged within ten days of an incident from the time that it occurred and I still felt that we had a lot of investigations still and I had to have all the facts gathered and I was concerned if we did determine at the end of our investigation that [the Complainant] had some responsibility…that I would not be able to charge him at that point because of the time limits."

(TR at 301). B. Bennett testified that on the day that he entered the assessment, he still was not quite sure whether or not the Complainant had violated Rule 103. Referring to RX 26, the collective bargaining agreement applicable to the Complainant in June of 2011, B. Bennett

testified that the rule regarding the ten day time period in which to charge an employee is found at RX 21 at 6 in the paragraph marked Section 2.A.1.a. B. Bennett testified that a charge letter is generated once an assessment is entered that requires an employee to attend a formal investigation. B. Bennett testified that an administrative clerk generates the charge letter and that the process of issuing a charge letter takes two to three days. He testified that a company officer is the one who enters assessments into a computer system. B. Bennett testified that he asked T. Thornton to alert the Complainant that an assessment was going to be entered "out of respect" for the Complainant. (TR at 304).

B. Bennett testified that T. Thornton met with the Complainant on the morning of June 11, which he knew because T. Thornton called him after her conversation with the Complainant. B. Bennett testified that T. Thornton told him that she told the Complainant that an assessment was being entered and that the Complainant "went off on her." (TR at 304). B. Bennett testified that T. Thornton quoted the Complainant as saying that "this was fucking bullshit and that he would shut the yard down." (TR at 305). He testified that T. Thornton said the Complainant actually used the term "fucking bullshit." (TR at 305). B. Bennett testified that T. Thornton sounded distraught, that her voice was shaking and she sounded emotional. He testified that based on his experience working with T. Thornton for several years, her behavior on the morning of June 11 was not typical of her. B. Bennett testified that he thought the Complainant's behavior, as described to him by T. Thornton, was out of line, "[b]ecause I can't have one of our employees talking to one of my company officers like that." (TR at 305). B. Bennett testified that T. Thornton did not tell him that the Complainant had reported unsafe conditions in the Waycross yard involving freight cars coming out of the bowl toward the hump. B. Bennett testified that T. Thornton did not tell him that the Complainant proposed any safety measures or said anything about the FRA during their meeting.

B. Bennett testified that that he did not know whether the Complainant was capable of shutting down the Rice Yard, but that a conductor such as the Complainant could "definitely make a strong effort to slow the yard down, I mean, almost to a standstill." (TR at 306). B. Bennett testified that a conductor could do this by purposefully walking the tracks as slow as possible, or blocking other jobs from moving in the bowl. He testified that his would eventually result in delays in cars getting to customers.

B. Bennett testified that he spoke with his boss, Mr. Don Jones, on June 11 after he was notified about the Complainant's behavior toward T. Thornton. B. Bennett testified that he called D. Jones because of the significance of the incident and that he reported to D. Jones what T. Thornton had told him. He testified that he told D. Jones that the Complainant had used the phrase "fucking bullshit" and had threatened to shut down the yard. He testified that he did not tell D. Jones that the Complainant had reported unsafe conditions in the Waycross Yard because none had been reported to him. B. Bennett testified that D. Jones' response to the report of the Complainant's behavior was "That's unacceptable. We can't have someone, an employee talking to a manager that way and threatened to and made a threat against [the Respondent.]" (TR at 308). B. Bennett testified that D. Jones instructed him to get a statement from T. Thornton and "to make sure an assessment was entered on [the Complainant] for his conduct." (TR at 309).

Referring to T. Thornton's e-mail statement at RX 10, B. Bennett testified that he did not believe based on T. Thornton's e-mail that the Complainant had raised any safety concerns during his meeting with her on June 11; nor did he believe that he had reported any unsafe conditions in the Waycross rail yard involving freight cars coming out of the bowl toward the hump. B. Bennett testified that he attempted to speak with the Complainant on June 11, but that his call to the Complainant's cell phone was not returned. He testified that he believed that he left a message on the Complainant's phone, but that he could not recall what he said in the message. B. Bennett testified that the Complainant never returned his call. B. Bennett testified that he spoke with T. Riggins on June 11th, alerted him of the incident, and told T. Riggins that he was trying to get in touch with the Complainant. B. Bennett testified that he could not recall the content of his conversation with T. Riggins, verbatim, but that he did not tell T. Riggins that the Complainant should not "blow the situation out of proportion." (TR at 311). B. Bennett testified that he was not involved in the decision to charge the Complainant with a rule violation based on his conduct on June 11.

He testified that the TAPs Team rescinded the charge related to the sideswipe incident, and that he was the one to make that decision. B. Bennett testified that he decided not to charge the Complainant in relation to the sideswipe incident because of extenuating circumstances related to the operation of the hump system and the fact that he could not determine where the Complainant was in the bowl while he was coupling. Referring to the e-mail at RX 8, B. Bennett testified that he sent the e-mail as part of the investigation into the sideswipe listing the reasons why he felt that the cause code should be changed from H301 to S016. He testified that the cause code was changed around June 15th. B. Bennett testified that he tried, but was not able to discover the person who turned off the alarm on the hump system. He testified that the TAPs team voted on the cause code throughout the investigation and that he had voted for a signals-related cause code from the beginning; however, he still believed that the Complainant bore some responsibility for the sideswipe relating to the Rule 103 violation. B. Bennett testified that his decision not to charge the Complainant in connection with the sideswipe did not have anything to do with the fact that he was going to be charged with a rule violation relating to his conduct in his meeting with T. Thornton.

Referring to the train accident report concerning the sideswipe at RX 27, B. Bennett testified that the report was prepared by the TAPs Team and the purpose of the report was to identify what happened during the sideswipe incident and to put an action plan in place to prevent it from happening again. B. Bennett testified that the report was finalized sometime in the week after the sideswipe, possibly June 17. B. Bennett referred to RX 27 at 16 and testified that the bullets on that page were items the team felt were necessary to ensure that the sideswipe incident did not happen again. B. Bennett explained the multiple changes to procedure that were made in response to the incident including increasing the amount of space available to work in a "full" track. (TR at 319). B. Bennett testified that he and the other members of the TAPs team determined which measures were included in the action plan, and that the Complainant did not suggest any of the items listed in the plan, nor did he suggest any safety measures in response to the sideswipe incident. B. Bennett testified that he was not disciplined for the sideswipe and that his opportunities with the Respondent were not affected by the sideswipe.

B. Bennett testified that he met with the Complainant and T. Riggins on the Monday following the sideswipe incident. B. Bennett testified that in this meeting, he informed the Complainant that an assessment for the sideswipe incident would not be entered but that he would be charged with a GR-2 violation for the way he handled himself with T. Thornton. When asked if the Complainant responded, B. Bennett testified, "I think he was kind of shocked." (TR at 321). B. Bennett testified that during this meeting he did tell the Complainant that he expected to be called back when he called someone. He testified that he had told the Complainant to call him back in relation to the June 11 incident and that the Complainant had not done so. B. Bennett testified that he was one of the Complainant's supervisors on June 11. He testified that the meeting with the Complainant and T. Riggins lasted approximately 15-20 minutes and that he did not raise any safety concerns or suggest any remedial measures to prevent another sideswipe during that meeting. B. Bennett testified that the Complainant was dismissed for his conduct on June 11, a decision with which B. Bennett agreed because the Complainant's language and threats to shut down the yard were "unbecoming." (TR at 323-324).

B. Bennett explained the Respondent's safety committees, which are made up of union representatives and representatives from the Respondent's departments. He explained that the committee meets monthly and that the members discuss safety concerns, which are solicited by the members of the committee from employees. B. Bennett testified that employees could attend these meetings and report safety concerns, but that to his knowledge, the Complainant had never done so. He testified that at meetings in which he was present another conductor at the Rice Yard who was a member of the safety committee, Mr. Royals, had reported hazardous safety conditions. B. Bennett testified Mr. Royals' frequency of reporting hazardous safety conditions was "a lot. I mean, I'm sure every meeting." (TR at 327). Referring to Mr. Royals' employee history at RX 38, B. Bennett testified that during his tenure as terminal superintendent the Respondent never disciplined Mr. Royals. B. Bennett also testified that employees would report hazardous safety conditions to their local union chairman and that the Complainant's local chairman in June of 2011 was T. Riggins. He testified that T. Riggins had reported hazardous safety conditions and that during his tenure as terminal superintendent, to his knowledge, T. Riggins had not been disciplined.

B. Bennett testified that the Respondent has an anti-retaliation policy and that the consequences for violating the policy could include dismissal. He testified that he knew about the FRSA in June of 2011. He testified that at no time in his dealings with the Complainant did he take any action because the Complainant had raised safety concerns to the Respondent. B. Bennett testified that the Complainant never raised any safety concerns with him and he never became aware of any safety concerns that the Complainant had raised.

B. Bennett testified that after the Complainant's employment with the Respondent was terminated, he encountered the Complainant at the Rivers Bar in March of 2012. B. Bennett testified that on the night of the Rivers Bar incident he arrived to the bar first and that the Complainant later arrived at the bar with two employees of the Respondent. B. Bennett testified that shortly after the Complainant arrived, he saw that the Complainant looked upset, so he asked one of the Respondent's employees to leave the bar with him "because I didn't want any drama" with the Complainant. (TR at 336). B. Bennett testified that the Complainant followed them out of the bar, told B. Bennett that he had an "ass whipping coming" to him, and blamed B. Bennett

for losing his job. (TR at 337). B. Bennett testified that they were outside the bar for approximately 10 to 15 minutes and that he did not want to turn his back to the Complainant. B. Bennett testified that that the Complainant yelled and screamed at him and that the bar owner and other patrons came outside trying to defuse the situation. B. Bennett testified that the Complainant ultimately pushed him and swung at him. B. Bennett testified that he did not strike back, but that the Complainant pulled a knife out of his pocket and threatened to kill B. Bennett. B. Bennett testified that after the Complainant pulled the knife on him, he ran to the other side of the parking lot and called 911. B. Bennett testified that the Complainant and the people he arrived with got into a car and left before the police arrived. B. Bennett testified that he was not intoxicated but that the Complainant appeared to be "very" intoxicated. (TR at 339-340). B. Bennett testified that the Complainant was ultimately arrested and charged, though he was not sure what the charge was. B. Bennett testified to his understanding that the charges against the Complainant were still pending and that he was not charged with any crimes in connection with this incident.

B. Bennett testified that he alerted his boss, D. Jones, of the Rivers Bar incident that evening after calling 911. He testified that he told D. Jones about it because a former employee was threatening his life, and because he "wanted [D. Jones] to be aware of the situation since it did involve [the Complainant]." (TR at 341). B. Bennett testified that he summarized the incident for D. Jones that evening, and that he wrote a statement, which he identified as RX 44, regarding the incident the next day.

On cross examination, B. Bennett testified that he was the most senior manager of employees who worked in the Transportation Department. He testified that before June of 2011 he had no opinion about the way the Complainant conducted himself and that they had spoken to each other outside of work. B. Bennett testified that as of the time of the March 2012 incident at the Rivers Bar, the Complainant was no longer an employee of the Respondent as he had been dismissed approximately nine months prior. B. Bennett testified that the surveillance video of the incident at the Rivers Bar shows himself and the Complainant talking for about ten minutes, though he "wouldn't call the entire conversation talking." (TR 345). B. Bennett testified that the Ware County Sheriff's Department responded to the 911 call he made, but that Respondent's police officers became involved in the investigation. B. Bennett testified that the Respondent's police officers became involved because the company takes threats against its employees very seriously, and that it is not uncommon for them to be involved in such a situation. B. Bennett testified that he was not sure who notified the Respondent's Police but that he would speculate it was D. Jones. B. Bennett testified that the Rivers Bar is not on the Respondent's property and the event did not occur during his working hours.

B. Bennett testified that at the Complainant had been dismissed at the time of the incident but that he still "had a pending Labor Board issue that I think he had to go through." (TR at 347). When asked whether the encounter with the Complainant involved a threat to the Respondent's property, B. Bennett answered, "Just an officer of the [Respondent]." (TR at 347). B. Bennett was asked if the Respondent's Police get involved in every event that involves an employee off the property after work, to which he answered that he did not know if they were involved in every incident but that in this situation they were involved due to the threat to his life and the fact that it was a former employee making that threat.

B. Bennett testified that the Respondent's police were not involved in the other physical altercations in which he was involved at the Rivers Bar. B. Bennett testified that they were not involved because the first of these incidents did not involve another employee or former employee of the Respondent and his involvement in the other incident was limited to trying to break up a fight between a Respondent employee and another patron. Referring to the first incident, B. Bennett testified that the four affiants, who swore that he "blind-sided" the other person involved in the confrontation with a punch, were lying. Referring to a third incident at the Rivers Bar involving a Respondent employee and his wife, B. Bennett testified that the affiant was also lying and that he was not involved in an altercation with them. When asked why all of these affiants might lie about him, B. Bennett testified that one of them is related to the Complainant. When asked whether the Respondent Police arrested the Complainant, B. Bennett testified that he believed that they were "involved" but that it was the Ware County Sheriff's Department that conducted the arrest. B. Bennett testified that in March of 2012, there were no issues between himself and the Complainant except for the fact of the Complainant's termination.

B. Bennett testified that before the conclusion of the investigation into the sideswipe incident in June of 2011, a preliminary cause code of human factor was assigned. He testified that the preliminary cause code is not included in the final report. He testified that the signal issues were not identified early in the investigation and that the process took a significant amount of time to identify the issues with the system. B. Bennett testified that as of June 10, when the assessment was entered against the Complainant, the preliminary cause code for the incident was the H301, human factor cause code. B. Bennett testified that on June 13, the assessment was rescinded because the TAPs team determined that the true cause of the sideswipe incident was a signal cause issue and B. Bennett did not "feel comfortable charging [the Complainant] with a human factor event." (TR at 356). B. Bennett testified that he did not feel comfortable charging the Complainant in relation to the sideswipe event because, "In a way, I didn't think it was fair because there were too many underlying issues with the signal system to charge him." (TR at 356). B. Bennett testified that the phrase "bullshit" could mean "not fair," though he testified that it was not just "bullshit" that he heard. (TR at 357).

B. Bennett testified that an FRA reportable accident is a "big deal" at the Waycross Yard. (TR at 357). He testified that when such an accident occurs, one thing that managers look at when determining the cause is whether an employee broke a rule. He testified that none of the action items following the investigation of the sideswipe incident indicates that the Complainant had done anything wrong. B. Bennett testified that one of the action items increased the amount of empty track available to work in. B. Bennett testified that the Complainant had 12 feet of free space in track B46 on the day of the sideswipe incident, which he testified the new rule would prevent. B. Bennett agreed that 12 feet was an unacceptably small amount of free track and that this was one of the reasons it was unfair to charge the Complainant with the sideswipe.

Referring to RX 9 at 14, B. Bennett testified that the line reading "Incident Date and Time 5/13/11 0747 Hour" under the heading "Railroad Accident Reporting System- Incident Side Swipe" related to the Signals Department's effort to assign the cause of the sideswipe to human error rather than signals. He testified that he was not aware of another sideswipe incident on

May 13, 2011. Referring to the same page under the heading "Previous Incident/ Injury(s)" where it references an employee fatality on April 29, 2011, B. Bennett testified that this incident was the last incident with an injury that occurred with the Signals Department. Regarding to the May 13, 2011, date in RX 9, B. Bennett referred to the e-mail chain with the Subject Line "Waycross Sideswipe May 13, 2011" at RX 59 at 186. When asked whether this e-mail chain refreshed his memory regarding another sideswipe incident at the yard, he testified that from what he can tell the e-mail chain did not relate to a sideswipe because the cause code discussed was "EOHC," which is a mechanical cause code whereas sideswipe incidents are generally human factor or signal cause codes. (TR at 379).

B. Bennett testified that T. Thornton never told him that the Complainant had made reports of safety issues to her. Referring to RX 10, B. Bennett testified that he had received the e-mail from T. Thornton on June 11, 2011, and that he probably forwarded the e-mail to Don Jones but that he did not recall when, if he had done so. B. Bennett testified that the line in the e-mail that quotes the Complainant, "he said he didn't make any waves about he could have been killed during the incident" did not constitute a report of a safety issue. B. Bennett confirmed that he told the Complainant during their meeting relating to the GR-2 charge that he expects somebody to call him back. Referring to CX 10, B. Bennett testified that at some point before 8:10 P.M. on June 13, 2011, he gave the instruction to withdraw the assessment against the Complainant for the Rule 103 violation. B. Bennett testified that he did not recall on what exact date he decided to enter an assessment for a GR-2 violation against the Complainant, though it could have been on that Monday.

B. Bennett agreed that he told the Complainant that the computer downloads looked good for him during the investigation, but also testified that there was still more to consider at that point. B. Bennett testified that he did not believe that he had all the information he needed to make the determination of where the Complainant was located during the sideswipe as of Friday, June 10th.

B. Bennett testified that the collective bargaining agreement required that a charge letter be received by the employee within ten days, but that the agreement did not require verbal notification of the assessment. B. Bennett testified that giving verbal notification was a division policy, though he did not know if this policy was written anywhere. B. Bennett testified that receiving news of an assessment might be bad news to an employee. He testified that a charge letter might indicate that the employee will be involved in an investigatory hearing but that it was possible that the employee might be offered a waiver and avoid a hearing. He also testified that the hearing could be canceled because "it's not uncommon for us to charge somebody or put an assessment on somebody until we get all the facts that we're looking for and then we feel there's not enough information for a charge to pull that assessment out." (TR at 374). B. Bennett testified that he told T. Thornton to tell the Complainant that an assessment had been entered on June 11. He testified that he was aware the Complainant had recently been a pallbearer at a friend's funeral. He testified that T. Thornton told him that the Complainant "went off on her" and that "he said this was fucking bullshit." (TR at 374).

B. Bennett testified to his understanding that T. Thornton had allowed the Complainant to return to work for a brief time, but that by the time she spoke with B. Bennett, the Complainant had

already called her back and told her that he did not feel he could work that day. B. Bennett testified that he relied on what T. Thornton told him, and believed what she told him, when he called D. Jones. B. Bennett testified that he communicated what T. Thornton told him to D. Jones. B. Bennett testified that he chose to "take [T. Thornton's] word for it" based on the amount of time she had worked for him and never lied to him. He testified that when he spoke with T. Riggins on the 11th he did not tell T. Riggins that he did not want the Complainant to "blow this out of proportion." (TR at 376).

When asked whether he knew that employees regularly use profanity at the Waycross yard, B. Bennett answered, "No, I do not." (TR at 377). B. Bennett testified that employees do not use profanity directed at him or his managers. He testified that it was possible that employees have used a "cuss word" but that he was "not there to police every bit of activity." (TR at 377). B. Bennett testified that he had never heard T. Thornton use profanity when talking to employees.

On re-direct examination, B. Bennett testified that that he was not sure of the date on which he decided it would not be fair to charge the Complainant in connection with the sideswipe, but that it was later in the week, "after all the relevant facts, we took into consideration as a team before I made that final determination." (TR at 381). B. Bennett testified that he did believe it was fair to charge the Complainant at the time he entered the assessment because "I still wasn't sure and my mind wasn't made up as far as a true cause and thought it was fair just because of the collective bargaining agreement knowing that the time limits may be an issue." (TR at 381). B. Bennett testified that when he ultimately decided that charging the Complainant in relation to the sideswipe incident would be unfair, he sent an e-mail requesting the assessment be withdrawn.

On questioning by this presiding Judge, B. Bennett testified that it was D. Jones who decided to enter the assessment for the GR-2 violation against the Complainant after their conversation. B. Bennett testified that this decision was made on June 11, the day that T. Thornton notified him of her encounter with the Complainant.

On re-cross examination, B. Bennett testified that D. Jones would not have known about the Complainant's use of profanity unless he told D. Jones about it. He further testified that he would not have known about the Complainant's conversation with T. Thornton unless she told him about it.

Deposition Testimony of B. Bennett (RX 58)

B. Bennett's deposition testimony was materially consistent on all relevant matters with his testimony at the hearing summarized above except as noted herein. Relevant subjects addressed only in the investigation or inconsistent with hearing testimony are summarized below.

B. Bennett testified in his deposition that while sideswipes had happened at the Waycross Yard before the one in which the Complainant was involved on June 5, 2011, the sideswipe involving the Complainant was "a different type of sideswipe…On the east end of the bowl, we rarely had it happen where we actually knocked a car out." (RX 58 at 45).

B. Bennett testified that he believed that the Complainant's threat to shut the yard down was a threat to "try to harm the railroad operation in some way to disrupt our core business." (RX 58 at 68). When asked whether T. Thornton ever asked him for the authority to take the Complainant out of service following her conversation with him, B. Bennett testified that, "by the time I talked to T. Thornton, I believe he was already gone." (RX 58 at 71).

When asked whether he had any memory of the meeting between himself, the Complainant, and T. Riggins and telling them that the Complainant would not be charged with the sideswipe but that he would be charged with a GR-2 violation, B. Bennett testified that he did not recall the exact conversation but that it might have happened. B. Bennett testified that he recalled wanting the Complainant to call him back, but that the Complainant was not charged with a GR-2 violation for not returning B. Bennett's call.

B. Bennett testified that there were already plans in place to add what he described as "blowback protection" or the ability to divert a car on the lead to another track if a car gets pushed out of the bowl. (RX 58 at 84). B. Bennett testified that the infrastructure for this capability was already installed and that they were working on this capability. He testified that the plans were in place "long before any of this happened." (RX 58 at 85). B. Bennett testified that the work was complete as of the time of his deposition. B. Bennett testified that this system "could have potentially" prevented the sideswipe in which the Complainant was involved but that "it's not 100 percent" and that it depended were the car was on the lead when the fouling car was knocked out. (RX 58 at 86).

Referring to the summary of awards e-mail from Mr. Garcia, summarized below at CX 19, B. Bennett testified that he believed the savings of approximately $70,200.00 referred to back pay that the company did not have to pay because the Complainant lost his appeal. B. Bennett testified that he did not know how Mr. Garcia reached that number.

On re-direct examination, B. Bennett testified that he made the decision not to charge the Complainant in relation to the sideswipe incident after T. Thornton informed him of her conversation with the Complainant. B. Bennett also agreed that even if one conductor were to work slowly to try to slow down production, that would not dictate the other approximately seven conductors would do the same. B. Bennett testified that the Complainant could still "slow the other people down by the actions he takes." (RX 58 at 130).

Testimony of Mr. Rodney Logan (TR 390-444)

R. Logan testified that he is currently employed by the Respondent as the Division Manager of the Florence Division and that before that he was the Assistant Division Manager of the Jacksonville Division. He testified that he held that position from January of 2011 to July of 2012. R. Logan testified that he reported to D. Jones, the Division Manager of the Jacksonville Division. R. Logan testified that he had worked for the Respondent for 21 years having started as a yardmaster working his way up to his current position. R. Logan explained that the Respondent's field operations are divided into three departments: the Transportation Department, the Engineering Department under which the Signals Department falls, and the Mechanical

Department. R. Logan testified that the Respondent has approximately 31,000 employees, the majority of which are unionized.

R. Logan testified that the Jacksonville Division's transportation operations were organized by terminals that would have either a terminal manager or a terminal superintendent. He testified that the division had approximately 87 managers at the time and that the transportation division had approximately 1,800 employees, not including the managers. R. Logan testified that the Jacksonville Division employees had several options for reporting safety concerns to management including calling a 24/7 toll-free hotline, they could file a report form "PI82," or they could report the issue directly to a manager or member of the Safety Committee. R. Logan testified that the hotline was monitored daily and that the "call-ins" were given to the manager of safety operating practices, who was Mr. Coakley at the time; himself; and D. Jones for follow-up. He testified that if the employee gave identifying information with the hotline call, the employee would be notified when corrective measures had been completed. R. Logan testified that the PI82 forms were posted with the safety bulletins and that follow-up on those also included contacting the filing employee, if they identified themselves, when corrective action had been taken. R. Logan testified that it was important to the Jacksonville Division management that employees report safety concerns because the employees have better opportunity to see the conditions and to report them versus the relatively small number of managers covering the same geographic scope of the Jacksonville Division.

R. Logan testified that during his time as assistant division manager he knew the Complainant but that he had not formed any impression of him before the summer of 2011. R. Logan testified that in the summer of 2011 became aware of a sideswipe incident in the Rice Yard that involved the Complainant. He recalled having a conference call regarding the incident on the morning it occurred with B. Bennett, D. Jones, and Mr. Coakley. R. Logan testified that the call included a brief description of the incident and the initial impression that it would be FRA reportable. R. Logan testified that at the time of the conference call, it appeared that the sideswipe was a human factor incident based on the information provided by B. Bennett describing how the incident occurred. R. Logan testified that there were approximately 70 human factor incidents that year. Referring to the e-mail at CX 12, R. Logan explained that a weekly call would take place to review with Division Managers incidents involving injury or that were FRA reportable. R. Logan explained that the purpose of these calls was to share incidents that happen across the system so that any corrective action can be implemented by the other divisions.

R. Logan testified that the Safety Division is responsible for reporting incidents to the FRA based on the cost estimates of damages input by local managers in the various departments. He testified that the Safety Department is located in Jacksonville, Florida. R. Logan testified that at no point during the investigation into the FRA incident did he become aware of any safety concerns raised by the Complainant. He testified that he was neither concerned that he would be disciplined or reprimanded as a result of the sideswipe incident nor did he consider disciplining any of the managers who reported to him as a result of the sideswipe incident. R. Logan testified that he did not discuss any potential discipline for any managers related to the incident with D. Jones.

R. Logan testified explaining his role in employee discipline as Assistant Division Manager for the Jacksonville Division. He explained that the initial assessment is entered by a local manager and that it would then go up to the Field Administration Group, which would generate the charge letter to the employee. He testified that the charge letter would then come to him and to the local manager who entered the assessment for approval and for any necessary changes to the charge letter. He testified that his electronic signature appears on the charge letter that is sent to the employee. R. Logan testified that following the investigatory hearing the hearing transcript is sent to him after being authenticated by the manager who conducted the hearing and the union representative who attended the hearing. He testified that both he and D. Jones review the transcript, the notice of finding from the hearing officer, and any exhibits attached to the investigation.

R. Logan testified that rule violations fall into categories of minor, serious, and major according to the discipline policy applicable to the "craft" employees. He explained that the Field Administration Group determines how a charge is categorized. He testified that the Field Administration Group is located in the Jacksonville, Florida, headquarters building. Referring to the "Individual Development and Personal Accountability Policy" (IDPAP) at RX 28, R. Logan testified that the policy would have applied to the Complainant as a conductor at the Waycross Yard in 2011. R. Logan explained that a "major" violation under the rule is a "cardinal sin" such as "excessive speeding, stop signal violation, track without authority, blue flag violation and also covers the conduct of employees." (TR at 403). R. Logan testified that approximately ten percent of rule violations are charged as "major." (TR at 403). Referring to the Consolidated Southern Region Agreement at RX 26, R. Logan testified that the collective bargaining agreement applied to the Complainant in 2011. R. Logan testified that the provisions regarding discipline are applicable to individuals who have been dismissed by the Respondent where the individual has appealed his or her dismissal to arbitration and the arbitrator has not yet ruled.

> "In my experience with labor relations, they refer specifically to the Article 10 Subsection D that refers to the ability for an employee to appeal a decision as made on property and until that appeal is either finished either by resignation of the employee or ruling by the arbitration labor board, that employee still falls within the guidelines in that it still is carried on the roster, they still have their 401K, also are still tied to [the Respondent] and there is no final ruling until after the arbitration ruling as far as their employment."

(TR at 405-406). R. Logan testified that being "carried on the roster" means that if the employee has appealed his dismissal to an arbitrator, he maintains his position on the seniority roster until the final ruling. R. Logan testified that he knew of one other instance in which an employee was charged during the period between when he was dismissed but the arbitration was still pending.

R. Logan testified that he knew T. Thornton on and off since about 2003 and that his impression of her was that she was diligent in her work and an advocate for employees when she worked in HR. R. Logan testified that he learned about the incident between T. Thornton and the Complainant from D. Jones. He testified that he learned from D. Jones that

> "Basically that as M[s]. Thornton had informed [the Complainant] that they had input an assessment against [the Complainant] that he became very upset, used

> the words F-ing bullshit directed towards Ms. Thornton and also threatened to shut down the yard."

(TR at 406). R. Logan testified that he also spoke to B. Bennett about the event and that B. Bennett had told him the same as D. Jones had concerning the Complainant's conduct. R. Logan testified that he never spoke to T. Thornton about the incident.

R. Logan testified that the use of profanity on the railroad is "fairly common, but in my position as a manager, I've not heard a lot of profanity directed toward me or around me and I've not used profanity around other employees." (TR at 407). Referring to the charge letter dated 6/17/2012 at RX 13, R. Logan testified that he reviewed the charge letter before it was sent out and confirmed that the signature on the letter was his electronic signature. R. Logan testified that it was D. Jones' decision to charge the Complainant with a rule violation. He testified that the charge was classified as a major charge, the discipline for which includes "up to dismissal." (TR at 408). R. Logan testified that he believed dismissal was appropriate in the Complainant's case based on his conduct and the threat against the Respondent to shut down the yard.

R. Logan explained that a waiver "is an option that can be afforded to the employee to accept all responsibility and it usually results in fewer days of discipline tha[n] what is called for in the policy." (TR at 409). He testified that there was discussion of offering the Complainant a waiver relating to the incident with T. Thornton. Referring to the e-mail between himself, T. Thornton, and other Respondent officials, including D. Lewis a labor relations official, at RX 12, R. Logan testified that D. Lewis recommended offering a waiver as "basically a slap on the hand and a very short leash for the future." (TR at 410). R. Logan testified that he made D. Jones aware of this e-mail, and that it was D. Jones' decision whether to offer the Complainant a waiver. R. Logan testified that he agreed with D. Jones' decision not to offer the Complainant a waiver "based on the conduct and the threat." (TR at 410). R. Logan testified that an investigatory hearing was held pursuant to the collective bargaining agreement and described the procedure that followed the hearing. He testified that after the hearing transcript is approved by the hearing officer it is sent, along with the hearing officer's notice of findings and any exhibits, to Field Administration. He testified that the record is then sent to him and to D. Jones, who both review the record. R. Logan testified that in cases involving discipline up to dismissal, he usually contacts Labor Relations to get their opinion, which he then provides to D. Jones along with his recommendation. R. Logan testified that he considered the hearing transcript, at RX 14, the Complainant's disciplinary history, at RX 1, and the Labor Relations recommendation, at RX 16.

Regarding the Labor Relations recommendation of a 60-day suspension, R. Logan testified that he disagreed with the recommendation based on the transcript, the Complainant's conduct, and the threat to shut down the yard. R. Logan testified that it was common for him to disagree with Labor Relations' recommendations for discipline, "About 40 to 50 percent of the time, about half the time." (TR at 413). R. Logan testified that he disagreed so often because "We had a different perspective than what a Labor Relations representative did…Theirs were geared typically more toward the arbitration aspect of the discipline process where ours were based on the operation and the conduct out in the field with the responsibility for that conduct." (TR at 414). R. Logan testified that in the Complainant's case, he recommended dismissal based on the evidence entered by the witness, T. Thornton, and his review of the Complainant's conduct,

language directed at T. Thornton, and the threat to shut down the yard as shown in the hearing transcript. R. Logan testified that the Complainant's disciplinary history also played a role in his decision because the Complainant had had a major charge less than a year prior to the incident with T. Thornton, "and typically when you see multiple majors, that results in dismissal." (TR at 415). R. Logan testified that he discussed his recommendation for dismissal with D. Jones and that in that discussion he reviewed the Labor Relations recommendation and the reasons for his own recommendation of dismissal. R. Logan testified that D. Jones' final decision was dismissal.

Referring to the dismissal letter dated 8/3/2011 at RX 19, R. Logan testified that the letter was generated by Field Administration and contains D. Jones' signature. R. Logan testified that no safety concerns or issues raised by the Complainant played a role in his recommendation that the Complainant be dismissed. He testified that at the time he made the recommendation, he was not aware of any safety concerns or issues raised by the Complainant.

Referring to the employee history of Mr. M. Middleton at CX 16, R. Logan testified that the first incident listed under "IDPAP Incidents,"[7] never came to his attention while he was assistant division manager. R. Logan testified that "IRC" is the Incident Review Committee that is made up of a group of union employees, including local chairmen, "and it's basically a peer intervention group that meets with an employee to discuss any type of rule infraction that had taken place and that typically is offered in the form of a waiver." (TR at 417). He testified that "ICI" is the Informal Coaching Instruction, and "that's a conversation that takes place between the manager that enters the assessment and the employee concerning any kind of minor rule infraction and corrective action so that does not occur." (TR at 417). R. Logan testified that the difference between ICI and IRC is that ICI is "simply the manager having that conversation with the employee concerning the rule infraction and corrective action ," whereas an IRC "is an option that's available to employee … [who wants] a peer group and they conduct that meeting without management being present." (TR at 418).

R. Logan testified that he believed that the Complainant's March 2012 River Bar incident with B. Bennett was unacceptable behavior. He stated that B. Bennett input an assessment related to the incident and that a charge letter was issued related to that assessment, at RX 21. R. Logan testified that the charge letter was generated using the same process he described in his earlier testimony. He testified that an investigation hearing relating to this charge never occurred. R. Logan testified that he signed the charge letter based on the information from B. Bennett, and from talking with D. Jones about the incident, that the Complainant physically assaulted and threatened B. Bennett, which is conduct unbecoming of an employee. R. Logan testified that physical assault on a manager constitutes a GR-2 violation and that physical assault and threats against a manager constitute grounds for dismissal. R. Logan testified that no investigation was held into this incident because the "arbitrator labor board had ruled on [the Complainant's] previous dismissal." (TR at 422).

R. Logan testified that he was familiar with the FRSA through training from the Respondent. He testified that his understanding was that the Act prohibited harassment or retaliation against

[7] Review of the exhibit reveals the incident described as "Remote control foreman using profane language over radio- suggest IRC." The Incident is listed as "Removed from consideration due to Policy removal provisions." (CX 16).

employees for bringing safety issues to the manager. R. Logan testified that the Respondent also has a policy regarding FRSA compliance, which he understands to mean that managers are required to comply with the FRSA and not to harass or retaliate against employees for bringing forth safety issues. R. Logan referred to the letter at RX 50 "that was sent to all the managers for [the Respondent] at the time by Mr. Michael Ward who's our CEO…depicting the 'right results the right way' and the guidelines around the FRSA." (TR at 423). R. Logan testified that he understood that as an employee of the Respondent that he could be subject to discipline if he did not comply with the FRSA. R. Logan testified that he did not take any action because the Complainant had reported safety concerns, and that the Complainant had not reported any safety concerns to him. R. Logan testified that at no time in his dealings with respect to the Complainant did anyone on his management team report to him that the Complainant had raised safety concerns.

On cross examination, R. Logan reiterated his testimony that he had never heard from any manager that the Complainant had made a safety complaint. R. Logan also reiterated his testimony that he read the transcript from the investigatory hearing as part of his work related to the Complainant's termination, including the part of the record containing T. Thornton's e-mail describing the event. R. Logan testified that he did not believe that T. Thornton's e-mail described reports of safety issues by the Complainant. In response to questions by Complainant's counsel, R. Logan testified that a sideswipe and someone getting killed in the bowl are safety issues and that the Complainant's complaint that he might have been killed in the bowl could be a safety issue. R. Logan testified that he did not believe that T. Thornton's e-mail was not a report of a manager describing safety issues raised by the Complainant.

R. Logan testified that D. Jones ultimately made the decision to terminate the Complainant. He testified that he had not spoken with D. Jones regarding his deposition testimony, nor had he read D. Jones' deposition. R. Logan testified that there had been incidents in which he had made one recommendation regarding discipline and D. Jones did something else, but in this instance his recommendation and D. Jones' decision were the same.

Referring to the GR-2 policy at RX 39 at 5, R. Logan confirmed that using profane language is a violation of the GR-2 policy. He confirmed that the policy does not contain exceptions for the amount of profane language that is acceptable, that the use of profane language is a violation of the policy. Referring to the employee history of Mr. Middleton at CX 16, R. Logan confirmed that T. Thornton conducted the ICI coaching session. R. Logan testified that he was not sure whether T. Thornton entered this incident as a GR-2 violation or a violation of the radio rule based on the information in CX 16. R. Logan testified that managers at the level of T. Thornton or B. Bennett have the discretion of whether to bring to his attention the use of profanity. R. Logan testified that neither B. Bennett nor T. Thornton brought to his attention Mr. Middleton's use of profanity, and that he therefore did not have the opportunity to decide if an ICI was the appropriate response. R. Logan testified that it was possible that T. Thornton could have decided not to bring to his attention the Complainant's use of the word, "bullshit," and that she could have decided not to charge him with anything, to give an ICI, or to report it to the division. (TR at 431). R. Logan testified that B. Bennett had the same authority. He testified that B. Bennett and T. Thornton had discretion as to how to handle those situations in that they had the discretion

whether to bring it to his attention, but that once such a situation was brought to his attention, he had to be involved.

R. Logan testified that he heard the earlier testimony from J. Dixon that the use of profanity including "bullshit, fuck or fucking" is common in the Waycross yard. When asked whether the common usage of those terms was not brought to his attention R. Logan stated, "well, that and the fact that I've been to the Waycross yard several times and not heard that…while I was [Assistant Division Manager.]" (TR at 433). R. Logan confirmed that people do not use those terms around him. He also confirmed that at the division he is not "getting overwhelmed with people violating GR-2 by using profanity at the Waycross yard." (TR at 433).

R. Logan testified that it was typical that he and D. Jones relied on the managers in the field to report rule violations to them. He also testified that the people drafting the charge letter also rely upon the information communicated to them from the managers in the field, but that the draft of the charge letter is sent out to the manager who entered the assessment and to the division so that corrections can be made. R. Logan testified that if he did not have personal knowledge of the facts described in an assessment, he would have to rely upon the information in the assessment. He testified that he would not make a decision regarding what discipline was appropriate based on an assessment letter because he would have to wait to examine the testimony at the hearing.

R. Logan again confirmed that he read the investigatory hearing transcript in its entirety, including T. Thornton's and J. Dixon's testimony. He testified that Mr. Garcia, the Labor Relations representative who made the recommendation for a 60-day suspension, also read the transcript and prepared a summary. R. Logan testified that he solicited Mr. Garcia's opinion on every case in which there is a potential of dismissal, which would include any major violation such as GR-2. R. Logan testified that the Field Administration Group categorizes a charge as "major" or "serious." (TR at 437). He testified that for example a mistake by a conductor resulting in car derailment might be categorized as just a "serious" violation, depending on the dollar amount. When asked whether an employee using the word "bullshit" is a major violation, R. Logan testified that, "Well I think in this case, it was the F-ing BS along with the threat to shut down the yard is what characterized as a major…based on the assessment that was entered by T. Thornton." (TR at 437-438).

R. Logan reviewed Mr. Garcia's discipline recommendation and testified that he was aware that the Complainant apologized to T. Thornton for his behavior and that T. Thornton had testified that she did not feel threatened by the Complainant's threat to shut the yard down. R. Logan testified that he was not sure how many years that Mr. Garcia had worked in Labor Relations.

R. Logan testified that an employee who states that he is refusing to work in an unsafe condition will not be disciplined. When asked whether an employee who states that "I'm going to advise my co-workers not to work in an unsafe condition" could be disciplined for that, R. Logan stated, "No, but I think there's more to that." (TR at 439). R. Logan testified that if an employee uses profanity in the course of making a report of a safety issue, they could be disciplined if they direct the profanity at a manager. When asked to explain what he meant by "direct it at a manager" R. Logan testified that he meant, "If you show irate action toward a manager using curse words, yes, it can result in discipline." (TR at 440). When asked whether an employee

"engaged in protected activity of making a report of a safety issue and in doing so, they use a profanity such as bullshit," can be disciplined under Respondent policy, R. Logan testified that, "To me, that's two separate issues. You have a safety complaint, but you still have to act in a professional manner as an employee." (TR at 440). R. Logan testified that he can "separate the safety issue from professional conduct." R. Logan testified that it was not a violation of the GR-2 policy for an employee to accuse a manager of creating an unsafe condition" based on the legitimacy of the complaint. R. Logan testified that he hoped that an employee who was making an accusation of creating an unsafe condition would, "do it in a way that would be less confrontational than just merely saying 'you're doing this.'" (TR at 442).

Referring to the excerpt of the collective bargaining agreement Article 10, Section 6.D. at RX 26, R. Logan testified that the agreement does not specifically address the issue of putting in an assessment against an employee who has been dismissed but has an arbitration pending. R. Logan testified that he had not worked in Labor Relations.

Deposition of Terri Thornton (RX 59)

T. Thornton testified that at the time of the deposition she was employed by the Respondent but would be retiring in the near future after 37 years of working for the Respondent. T. Thornton had been working in Waycross as a trainmaster since November of 2009. T. Thornton testified that she had worked as a trainmaster in other locations before that. T. Thornton testified that she had worked with the Complainant for a few months before her conversation with the Complainant in June of 2011. She testified that as a trainmaster her responsibilities in supervising the employees included ensuring they are following the operating rules and getting their assigned jobs done. T. Thornton testified that approximately twelve conductors work under the supervision of the trainmaster per shift.

T. Thornton testified that in the months leading up to June 11, in her observation of the Complainant, she had "no issues with his work" and agreed that meant he did a good job. (RX 59 at 17). Mr. Thornton testified that she did not socialize with the Complainant outside of work. She testified that she did not have any negative interactions with him prior to June 11, 2011. T. Thornton testified that she did not know of any incidents between the Complainant and his coworkers that were out of the normal working relationship. She testified that as far as she knew the Complainant had a good working relationship with the other managers at the Waycross Yard.

T. Thornton testified that as a trainmaster, she expected that the conductors who worked under her supervision would perform their jobs in a safe manner because "safety is number one importance at the railroad." (RX 59 at 18). She testified that the railroad is an unforgiving environment and that it is easy to get hurt if one is not paying attention. T. Thornton explained the characteristics that make an incident "FRA reportable." (RX 59 at 19).

T. Thornton testified that she first learned of the June 5, 2011, sideswipe incident in which the Complainant was involved because she was notified, as trainmaster, when the damage to the sideswiped cars was discovered. T. Thornton testified that when the damage was discovered, an investigation was started. She testified that she also notified B. Bennett of the possibility of a

sideswipe in the bowl. T. Thornton testified that she informed B. Bennett of the damage and of the progress of the initial investigation because he was her boss. T. Thornton testified that she would also have made an initial report indicating that the incident was FRA reportable and that at that time she did not make any decision as to whether or not to bring charges against anybody.

T. Thornton testified that the incident was eventually determined to have been a sideswipe. She testified that such incidents were "not a regular occurrence, but it does happen." (RX 59 at 28). She testified that she did not recall a sideswipe incident that took place on May 13, 2011, and that it was possible that she was not at work when it occurred and, therefore, may not have known about it. T. Thornton testified that she recalled the accidental death in the yard that occurred in April of 2011, and agreed that such an occurrence was very unusual.

T. Thornton testified that as a result of the sideswipe incident, a bulletin was sent out requiring a certain amount of room be left at the end of each track. She testified that this change occurred June 6, 2011, and that thereafter the hump yardmaster would communicate with the foremen in the bowl to let them know about the room remaining in the track. She testified that tracks would also be blocked out.

T. Thornton testified that she considered the sideswipe incident to be a safety concern. She testified that the Respondent also considered a sideswipe to be a safety issue because "any sideswipe could become, potentially, a safety issue…could make cars derail, it could cause injuries." (RX 59 at 43). T. Thornton testified that coupling cars requires the conductor to go between the cars to ensure the couplers were not misaligned. When asked whether it was possible that a conductor who was between cars during a sideswipe incident could be crushed, T. Thornton testified that "there are procedures in place to prevent that from happening. Employees can't get in between cars without having three-point protection. And a remote control person would have his box so that the cars could not move. Now, if he was fouling the track, I don't know." (RX 59 at 45). T. Thornton clarified that she could not say if a sideswipe could injure a conductor who was in the process of moving a knuckle because there are procedures in place to prevent an injury, but "only if they are following the proper procedures." (RX 59 at 45). T. Thornton agreed there are expectations of conductors who are coupling cars to build a train with a certain amount of efficiency or timeliness because of schedules.

T. Thornton testified that she was not present for any conversations between the Complainant and any other Respondent employees regarding the investigation into the sideswipe incident and that she was not informed of the results of the engine downloads. T. Thornton testified that on June 11, 2011, she had a conversation with the Complainant shortly after her shift began. She testified that she input an assessment against the Complainant for a Rule 103 violation before she went to speak with him on June 11, 2011. When asked who made the decision to enter an assessment against the Complainant for a Rule 103 violation, T. Thornton testified that she would have had to discuss it with B. Bennett, and that B. Bennett initiated that conversation.

T. Thornton testified that entering assessments was part of her duties as a trainmaster, but that she did not do it regularly, entering probably three or four per year. Referring to the assessment relating to the GR-2 violation entered as Exhibit 4 to her deposition, T. Thornton testified that the e-mail address in the "from" line indicated that the message was generated by the computer

system in Jacksonville. She testified that entering an assessment does not necessarily mean that a charge will be done. T. Thornton explained that for example, for the rule 103 violation she recommended an IRC, an informal coaching session, and that the Complainant was not charged with anything though there is a record of his discipline.

T. Thornton testified that B. Bennett made the decision to enter an assessment for the Rule 103 violation, but that she entered it because she was the trainmaster at the time it was discovered. T. Thornton testified that the superintendent did not normally enter assessments and that B. Bennett would have delegated this task verbally per normal procedures. T. Thornton testified that Respondent policy required that any time there was an incident involving property damage "some type of record has to be established," but that an assessment against an employee was not required. (RX 59 at 58). T. Thornton testified that she was following B. Bennett's order to enter the assessment and that he told her how the rule 103 violation should be described. When asked whether it was the Respondent's practice to find fault with the conduct of an employee in response to an accident, T. Thornton testified that it was not. When asked whether she felt pressure to identify the problem as human error, as opposed to a structural problem, when there was an investigation into an incident T. Thornton testified that she did not.

T. Thornton testified that on June 11, 2011, B. Bennett called her and told her to notify the Complainant that an assessment would be put in for the sideswipe incident because the investigation found that he was responsible for fouling the track causing the sideswipe. T. Thornton testified that when B. Bennett called her she was in A Tower and that she took her truck over to B Tower. T. Thornton guessed that walking that distance would have taken approximately 20 to 30 minutes. T. Thornton testified that she found the Complainant in the break room in the B Tower. T. Thornton testified that other people were in the room and that she specifically recalled that J. Dixon was leaving during her conversation with the Complainant. T. Thornton testified that she asked the Complainant to step outside with her to talk and that when they got outside she informed him that an assessment for a rule 103 violation would be entered relating to the June 5 incident.

T. Thornton testified that she would typically notify an employee of a rule violation when she observed it. T. Thornton testified that after she informed the Complainant that an assessment was being entered against him, he "became very upset, said it was F'ing BS, and that he was going to shut down the yard, walk every track, call the lawyer, because we knew we were in the wrong, that he could have been killed during the incident. He just became very upset." (RX 59 at 69). T. Thornton clarified that the Complainant actually used the phrase "that's fucking bullshit." (RX 59 at 69). She testified that she could not recall him using any other profanity during the conversation. T. Thornton testified that she did not feel threatened during the conversation and that she did not believe that the Complainant could have shut down the yard, but that she believed he could try. T. Thornton testified that shutting down the yard would take "a lot more than just walking the tracks." (RX 59 at 70). T. Thornton testified that she believed no one employee such as the Complainant has the authority to shut down all of the work in the yard. T. Thornton testified that she was not "absolutely positive" that the Complainant used the word "bullshit" because it happened two years prior. However, T. Thornton testified that she was "pretty sure" he used the word "fucking." (RX 59 at 72).

T. Thornton testified that although she normally informs an employee "right then and there" when she is going to enter an assessment, she did not do so regarding the Complainant's use of profanity. T. Thornton testified that her conversation with the Complainant lasted five to ten minutes. She testified that she believed the Complainant told her that he thought it was unfair to charge him with the Rule 103 violation because while coupling at one end he could not see if the other end of the train was protected. T. Thornton testified that she recalled the Complainant saying that he could have been killed in the sideswipe incident and that the Complainant brought up the recent death in the yard. T. Thornton testified that the Complainant also stated that he could have "made a big deal" about the sideswipe incident because he could have been hurt. When asked whether she agreed that a discussion about the recent death was a discussion of a safety issue, T. Thornton replied that "It was an entirely different circumstance, but yes, it could have been a safety issue." (RX 59 at 75).

T. Thornton testified that she told B. Bennett about her conversation with the Complainant because she "felt that it was an incident that was a concern." (RX 59 at 76). She testified that she informed B. Bennett by telephone. T. Thornton testified that she told B. Bennett that the Complainant "became very upset, that he made statements about shutting the yard down, contacting a lawyer, safety issues, that he could have been killed, and that he was extremely upset." (RX 59 at 78). T. Thornton testified that she believed she also told B. Bennett about the Complainant's use of profanity. T. Thornton testified that she called B. Bennett immediately after she got back to the tower. She testified that she could not recall B. Bennett's response or whether he asked her to do anything.

T. Thornton testified that she later had a follow-up conversation with B. Bennett. She testified that she believed during this conversation, B. Bennett told her that he would contact the division manager and let her know what to do. Referring to Exhibit 4 to her deposition, T. Thornton testified that she believed she entered the assessment for the GR-2 violation on June 13. Referring to her e-mail to herself, with B. Bennett cc'd, summarized below at RX 10, T. Thornton testified that she wrote the e-mail because "Any time I have an incident that I feel is a pretty serious incident that I may have to remember later, I write myself an email." (RX 59 at 81). She testified that she cc'd B. Bennett on the e-mail because he was her boss and she had told him about the conversation. When asked whether she or B. Bennett had made a decision to charge the Complainant with a GR-2 violation at the time she wrote the e-mail to herself, T. Thornton indicated they had not.

Still referring to the e-mail she wrote to herself, T. Thornton testified that she did not recall specifically what the Complainant said about "shut this yard down," but that she believed "he meant slow the yard down, not shut it down." (RX 59 at 84). However, T. Thornton testified that she wrote "shut the yard down" because that is what the Complainant said. T. Thornton testified that when she referred to "cursing" by the Complainant, because she would not put the words he used in a company e-mail. When asked if she remembered the reason the Complainant was saying he would "walk every track," T. Thornton testified that would "slow production down at the railroad. I assume that what's [sic] he meant, I guess." (RX 59 at 85). T. Thornton testified that it was possible but that she did not remember if the Complainant saying that if every conductor had to monitor the back end of the train they were building they would have to walk all the way down to the back end of the train each time they coupled a car. She also testified that

it was possible but that she did not remember if the Complainant said that conductors having to walk all the way to the other end would have the effect of shutting down the yard or slowing down production. T. Thornton testified that the Complainant said he would call a lawyer, but that she did not recall if he said a particular reason why he would call a lawyer.

Still referring to the e-mail she wrote to herself, T. Thornton testified that the Complainant said he had not made any waves about him possibly being killed in the incident and agreed that the Complainant's description that he could have been killed is a safety issue. T. Thornton testified that to her knowledge the Complainant had not "made any waves" about potentially being killed between the date of the sideswipe incident and their conversation in the B Tower. T. Thornton testified that she agreed that she understood the Complainant's comment about having just killed someone in the bowl was a reference to the casualty in April of 2011, and that she agreed that his comment was a safety issue. Referring to the statement by the Complainant, as summarized in her e-mail, that "we knew we were in the wrong because we put in new procedures to prevent this from happening again," T. Thornton testified that she believed the new procedures related to the procedures enacted after the fatality because she believed that at the time of their conversation the procedures relating to the car lengths left in a crowded track had not yet been issued. When T. Thornton referred to the date on the bulletin relating to crowded tracks, however, she agreed that the bulletin was issued before her conversation with the Complainant. T. Thornton testified that the "we" in that comment was her referring to the Respondent.

Still referring to the e-mail to herself, T. Thornton explained that her description of the Complainant as "very irate" was a description of him "talking in a loud voice, he was using profanity, and he appeared to be extremely upset." (RX 59 at 93). T. Thornton testified that she could not recall but that she might have begun the conversation by telling the Complainant that "I know you're going to be upset with what I have to tell you." (RX 59 at 93-94). T. Thornton testified that she might have said that because "he was under the impression that there would not be an assessment put in for that incident." (RX 59 at 94). She testified that she might have told him that an assessment would not be put in following the engine downloads in the initial investigation.

T. Thornton testified that an employee is not charged every time an incident occurs and that she, as a supervisor during an incident involving property damage, is not concerned that she will be disciplined. T. Thornton testified that she would understand why the Complainant would be upset having been told that he was not going to be charged and then being informed that he would be charged. T. Thornton testified that she did not write that she felt threatened by the Complainant because she did not feel threatened by the Complainant. "Not for that terminology. I mean, if I felt he was violent, then I would have taken him out of service." (RX 59 at 99). T. Thornton testified that she allowed the Complainant to continue to work and that when she left B Tower she assumed that the Complainant would work the rest of the day and continue working thereafter. T. Thornton testified that it was possible the Complainant said that he would contact the FRA, but that she did not remember.

Still referring to the e-mail to herself, T. Thornton testified that the Complainant called her to inform her that he was too upset to stay at work that morning. T. Thornton testified that the Complainant's actions in the 7:45 phone call did not give rise to a violation of any kind of rule.

She testified that what she remembered from the 8:00 phone call was consistent with what she wrote in the e-mail. T. Thornton explained that the Complainant's comment that he had "five crews to keep up with" referred to the job he was assigned that morning, which entailed ensuring that moves out of the bowl are safe and required him to concentrate and pay attention. T. Thornton testified that the Complainant told her that he was afraid he might get somebody hurt because he was too upset.

T. Thornton elaborated on her description of the Complainant as "irate" in the e-mail, agreeing with the characterization of the Complainant as somebody who has a naturally loud voice. She testified that by "carrying on" she was referring to "all the statements he had made" and that she did not recall the Complainant waving his arms or pointing at her. (RX 59 at 104). T. Thornton testified that she did not believe that the Complainant was making a personal attack against her. T. Thornton agreed that she understood the Complainant's comment that the assessment was "bullshit" to mean that he was saying it was unfair. T. Thornton testified that she believed that the decision to charge the Complainant with a Rule 103 violation for the sideswipe incident was unfair and later testified that this was her view on the morning of her conversation with the Complainant. T. Thornton testified that she had been in the bowl and would agree that at about 5:30 in the morning it is likely to be dark in the bowl. She agreed that it was impossible to see one end of the track when between full tracks at the other end.

When asked whether she was more sure that the Complainant used the word "fucking" or the word "bullshit," T. Thornton testified that she was "not absolutely positive about either one of them, but I believe that was the term he used. It's not an unusual term on the railroad." (RX 59 at 108-109). When asked to which term she was referring, T. Thornton answered, "Either one. In conjunction with each other." (RX 59 at 109). T. Thornton testified that use of profanity is fairly common among some employees of the railroad.

Referring to her testimony in the investigatory hearing, attached to the deposition as an exhibit and summarized below at RX 14, T. Thornton affirmed her testimony in the investigatory hearing that the Complainant apologized to her immediately for using profanity. T. Thornton testified that after the 7:45 and 8:00 phone calls following their conversation, the Complainant had her permission to leave work. She testified that she then called the crew management center, which had to "physically mark him [the Complainant] off in the computer in order to fill the vacancy that he was protecting." (RX 59 at 114). T. Thornton testified that she could not recall but that she assumed she told the crew management center to mark the Complainant off as sick. T. Thornton testified that any trainmaster or superintendent, including B. Bennett could call the center and instruct them how to mark the Complainant's absence. When asked whether she called the center and asked them to change the Complainant's status to "refused to work," T. Thornton answered "Not that I recall." (RX 59 at 116).

T. Thornton testified that other than the assessment she entered and the e-mail to herself, she made no other written descriptions of her conversation with the Complainant. T. Thornton reviewed her testimony in the investigational hearing that she expected everyone to comply with GR-2. She testified that complying with GR-2 included not using profanity but clarified that that was only a portion of the rule. When asked if there was an exception in GR-2 that permits using profanity "a little bit," T. Thornton testified that "profanity is just one small part of that rule.

There's a lot of things involved in it, and just someone saying a cuss word, I would not ever charge them with a GR-2 rule violation." (RX 59 at 118-119). T. Thornton testified that the operating rules apply to everyone at the railroad, including herself. However, T. Thornton testified that because it was not unusual, "I don't believe we would have anyone working at the railroad if we charged everybody with a GR-2 rule that said a cuss word." (RX 59 at 119-120). T. Thornton testified that she believed there is a difference between using profanity and swearing or cussing at someone, with the latter being more severe. T. Thornton agreed that the Complainant's description of the decision to enter an assessment against him as "bullshit" or "fucking bullshit" that he was not cussing or swearing at her.

T. Thornton testified that she recalled the incident in which Mr. Middleton used profanity over the radio and described the incident as "very" unusual. (RX 59 at 121). T. Thornton testified that she could not recall the context of Mr. Middleton's use of profanity, specifically "the F-word," over the radio but that she recalled him doing so and that she put in an assessment on him as a result. (RX 59 at 122). Referring to Mr. Middleton's employee history, summarized below at CX 16, T. Thornton testified that the radio incident occurred approximately five months after her conversation with the Complainant and that she put in the assessment against Mr. Middleton. T. Thornton testified that she wrote the excerpt "suggest IRC" and that this meant that Mr. Middleton received a coaching and counseling session about his use of profanity over the radio. T. Thornton testified that she conducted the coaching and counseling session. T. Thornton testified that Mr. Middleton's use of profanity over the radio had nothing to do with a sideswipe incident, calling a lawyer, calling the FRA, someone recently being killed, Mr. Middleton potentially being killed, policy changes to prevent this from happening again, or discussing safety over the radio.

T. Thornton testified that it was her decision to give Mr. Middleton coaching and counseling. When asked whether she had the option to give the Complainant coaching and counseling on June 11, 2011, following their conversation, T. Thornton testified, "that was not my decision" and that it was not her decision to charge the Complainant with a GR-2 violation. (RX 59 at 126). T. Thornton testified that when she made the decision to give Mr. Middleton coaching and counseling for his use of profanity over the radio, she was aware that he had been involved in some derailments of some cars. She testified that she was aware of Mr. Middleton's work history, including the derailment in 2009, because she was the investigating officer for the 2009 derailment. Referring to Mr. Middleton's work history, she explained that the entry indicating that he received "15-day AS" meant "actual suspension." (RX 59 at 127).

Referring to the assessment entry for the GR-2 violation that she wrote, T. Thornton testified that what she meant by "handling" was that "when he [the Complainant] was being notified of the discipline that was going to be assessed." (RX 59 at 130). When asked what happened between herself and B. Bennett in the period between when she sent the e-mail description of her conversation with the Complainant on June 11, and when she entered the assessment against the Complainant, T. Thornton testified that "nothing happened…other than him telling me to put this assessment in." (RX 59 at 130, referring to the GR-2 assessment). T. Thornton testified that she could not recall exactly, but that she assumed that B. Bennett told her to enter the assessment on the day it was entered, June 13. T. Thornton testified that before the assessment for the GR-2 violation was entered, the decision would have gone up to the division manager level because the

assessment was for a major rule violation, "and a trainmaster does not…have the authority to put in an assessment at all without talking to their supervisor and telling them…what occurred. And this…would have went all the way to…either a sys [sic] division level or a division manager's level." (RX 59 at 132). T. Thornton testified that the Rule 103 violation would not have to rise to the division level to be assessed because it is not a dismissible offense.

T. Thornton testified that she believed that D. Jones made the decision to charge the Complainant with a GR-2 violation, but that she was not present for the discussion between B. Bennett and D. Jones. T. Thornton testified that the Complainant was charged with a GR-2 violation because of her conversation with him and his behavior during that conversation. She testified that to the extent B. Bennett was involved in the decision to bring the GR-2 violation against the Complainant, he relied upon what she told him of the incident. T. Thornton testified that other than J. Dixon, there were no witnesses to the conversation between herself and the Complainant. When asked whether the Complainant was describing the conditions in the yard that were unsafe in his opinion, T. Thornton answered, "in his opinion." (RX 59 at 139).

Referring to the description of their conversation contained in a draft of the charge letter for the GR-2 violation, T. Thornton testified that she actually told the Complainant that he would be charged for the sideswipe incident, rather than that he "might" be charged, as written in the draft. Referring to the final draft of the charge letter that was sent to the Complainant, T. Thornton confirmed that the words "possible" and "might" remained in the final version. Referring to the recommendation from T. Lewis that the Complainant be given a waiver, T. Thornton testified that she did not speak with T. Lewis on the phone to describe her conversation with the Complainant. Referring to Mr. Garcia's recommendation of a 60-day suspension following his transcript review, T. Thornton testified that his recommendation was based on her testimony in the hearing as well as the Complainant's.

Referring to a string of e-mails summarized below at CX 8, T. Thornton testified that Mr. Thurmon worked in the administrative department for the southern region. She testified that Mr. Thurmon would have received the e-mail advising that the Complainant had been dismissed as a member of a list to which the e-mail was addressed. She testified that she did not know why Mr. Thurmon was suggesting that she would miss the Complainant but stated that "it's an inappropriate e-mail." (RX 152-153). T. Thornton testified that she had never had a conversation with Mr. Thurmon in which she said that the Complainant had been a problem for her and agreed that the Complainant had not been a problem. T. Thornton read her response and agreed with the characterization of her response as an attempt to deflect Mr. Thurmon's inappropriate comment.

Referring to the charge letter for the Rule 103 violation, T. Thornton testified that the use of the word "shove" was incorrect as the Complainant was coupling at the time of the sideswipe incident. After reviewing other documents, T. Thornton also testified that the Complainant did report that there was damage to the auto rack he was working on, contrary to the summary found in the charge letter. T. Thornton testified that she knew the Rule 103 violation was eventually withdrawn but that she was not sure if the charge letter was sent to the Complainant.

Referring to the transcript of the investigatory hearing, T. Thornton testified that the reason she went down to tell the Complainant about the assessment on June 11 was because B. Bennett told her to. When pointed to the difference between this statement and her statement in the investigatory hearing that she went to B Tower the morning of June 11 for job briefings and that she told the Complainant about the assessment because she thought it was right to inform him, not because B. Bennett told her to do so, T. Thornton stated that "this was… a long time ago." (RX 59 at 166).

When asked about her earlier conjecture that the Complainant meant "slow" the yard down rather than "shut" the yard down, T. Thornton testified that she said this because she did not believe that one person can physically shut down the yard. T. Thornton testified that any one foreman could slow the operation of the yard by working slowly. T. Thornton testified that if the conductor were to walk down to the end of the cut of cars toward the hump each time that he made a coupling, it would slow down production.

On cross examination, referring to the transcript of the investigatory hearing, T. Thornton testified that her testimony in that proceeding refreshed her memory that the Complainant used the term "fucking bullshit" during her conversation with him. T. Thornton testified that it was fair to say she had "more of a memory of the incident" at the time of the investigatory hearing than she did at her deposition.

T. Thornton testified that she believed there was a difference between the Complainant's use of profanity and Mr. Middleton's use of profanity. She testified that "I believe Mr. Middleton's to be a slip of the tongue. I believe [the Complainant's] to be made because he became angry and upset and made a lot more allegations than just saying those two cuss words." (RX 59 at 178). T. Thornton testified that there were also differences in the conduct of the two such as the Complainant "was very agitated and angry and making all kind of other statements besides just using profanity." (RX 59 at 178).

T. Thornton testified that there were multiple things the Complainant could do to slow down production at the yard such as "walk slower, take longer to couple tracks. I mean we are not in there watching them what they are doing. Just any number of things that a foreman can do to slow down production." (RX 59 at 179). T. Thornton testified that it would concern management if production were slowed down in the yard because of schedules to get a train to depart at a certain time. She testified that "all of the production issues in the yard are very important and they are monitored." (RX 59 at 179). T. Thornton testified that if the trains are not kept on schedule, the Respondent loses money.

On redirect examination, T. Thornton testified that if a foreman or conductor were unable to "efficiently couple cars to the extent that the railroad requires in order to reach their goals, then they would be given further training." (RX 59 at 180).

T. Thornton testified that she believed the final decision to terminate the Complainant was fair. When asked whether she thought it was fair despite her earlier testimony that profanity was used in the rail yard, T. Thornton testified that "it wasn't just the profanity that caused me concern. It was the inability of him to restrain himself and keep his temper. And, of course, the other

allegations that were made, calling a lawyer, shutting down the yard, we don't care about safety is pretty much what he said." (RX 59 at 181). T. Thornton agreed that it was because of the whole conversation on the morning of June 11 that she believed the GR-2 violation was appropriate. She also agreed that the whole conversation included statements about safety as well.

T. Thornton's Testimony in the Investigational Hearing (CX 5, RX 14)

T. Thornton's investigational hearing statements were materially consistent on all relevant matters with her deposition testimony except as noted herein. T. Thornton's statements at the investigational hearing were largely limited to the content of her conversation with the Complainant on June 11, 2011.

When asked whether the Complainant went into extended detail about his concerns that production would be impacted by the new rules related to his reference to shutting the yard down, T. Thornton testified that the Complainant did not go into all of that detail. T. Thornton testified that she did not believe the Complainant was such a threat that he would shut the yard down immediately after she departed the area following their conversation.

Deposition of Mr. Timothy Riggins (RX 60)

T. Riggins testified that he had worked for the Respondent at Waycross since 2001. He testified that he was the local chairman for the UTU for about a year and a half including 2011. He testified that as local chairman his main responsibility was to represent people in investigations. He testified that during his time as local chairman he represented "probably over a hundred" people, including the Complainant. (RX 60 at 12). T. Riggins testified that the Consolidated Southern Regional Agreement was the collective bargaining agreement. He testified that he knew the Complainant as a co-worker and that they had a good relationship. T. Riggins testified that he knew B. Bennett starting when he became the superintendent. He characterized their relationship as "okay" and cited instances in which they had disagreements over B. Bennett's treatment of employees such as charging some employees but not others with absenteeism or granting only select leave requests. (RX 60 at 15). T. Riggins testified that he had not had any problems with B. Bennett personally. T. Riggins testified that the only problem he had with B. Bennett after June 11, 2011, was the meeting in which the Complainant was charged with a GR-2. T. Riggins testified that he had known T. Thornton about three or four years during which time she was a Trainmaster at Waycross terminal. He characterized their relationship as "good" and described her as a "great manager." (RX 60 at 21). He stated that he did not have any problems with T. Thornton and that he could recall one instance in which she called him a "smartass," but that there had been a fatality that day. T. Riggins characterized this incident as a "little issue" with T. Thornton and that he did not take the comment personally because of the circumstances. (RX 60 at 22). T. Riggins testified that he did not feel threatened by T. Thornton when she used the term, "smartass."

T. Riggins testified that the signal maintainer died when he was run over by a train car in the Waycross Yard as he was working on switches in the yard. T. Riggins testified that the accident occurred in the hump and that the car that struck the victim had been intentionally pushed down

the hump by a conductor. T. Riggins testified that following that accident a new procedure was put in place requiring employees to seek permission from the A Tower before they go into the area to work.

T. Riggins characterized B. Bennett as an "okay" manager, citing as an example that he thought B. Bennett did not spend enough time per day working at the yard. He testified that he got along with B. Bennett and that issues are expected as part of being local chairman.

T. Riggins testified that the Respondent prohibited the use of profanity at the time under operating rule GR-2. He testified that he would hear profanity from management and employees, "Just in general…they didn't sit there and cuss one another out. It's just was in general use." (RX 60 at 28). T. Riggins testified that he believed there was a difference between casually using profanity and cussing someone out. When asked whether he believed that all Respondent employees who use profanity should be disciplined, T. Riggins testified that he believed that if one employee was going to be disciplined, all employees who use profanity should be disciplined. T. Riggins testified that he had been cussed out by a yardmaster before and that the yardmaster was "written up" but "they didn't run him off or nothing." (RX 60 at 30). He testified that this incident occurred in 2009 at the Waycross Yard. T. Riggins testified that he was told the yardmaster was "written up" but he was not sure if the yardmaster was charged with a rule violation. T. Riggins testified that he did not believe there was a difference between using profanity when talking to a manager or talking to another employee.

When asked whether he believed there was more reason to discipline an employee for using profanity when speaking with a manager than when speaking with another employee, T. Riggins stated, "Not when I know another manager cusses too…I don't think it's right for a manager to use profanity and write you up for using it." (RX 60 at 33). T. Riggins testified that he believed that profanity could be used in a threatening manner and that profanity could be directed at someone. He testified that in the two incidents he had mentioned with T. Thornton and with the yardmaster who cussed him out, the profanity had been directed at him. T. Riggins testified that he was not aware of any Respondent employees other than the Complainant who had been charged with using profanity.

T. Riggins testified that he knew Mr. Mark Middleton, a member of the UTU from the Waycross Yard. T. Riggins testified that he had represented Mr. Middleton as local chairman, and that he believed he had heard Mr. Middleton use profanity "in general" but not "cussing nobody out." (RX 60 at 34). T. Riggins testified that he could not recall what Mr. Middleton said and that he was not sure if Mr. Middleton was ever charged with using profanity.

T. Riggins testified that he had never heard T. Thornton use profanity other than her incident with him and that he only told B. Bennett about the incident "when we went and saw him a couple of days later that I had been cussed out too or cussed out twice. And nothing was done. I don't recall if I told him it was her particularly." (RX 60 at 35). T. Riggins testified that he did not believe T. Thornton should have been disciplined for her comments toward him because she was stressed out and the comment was unlike her. T. Riggins testified that he believed the yardmaster who cussed him out should have been punished. He explained that the difference between the two situations was he understood the stress under which T. Thornton was that day

but the yardmaster just "fl[e]w off" on him and called him a "sorry SOB," despite not being under stress as T. Thornton was. (RX 60 at 36-37).

T. Riggins testified that he first learned about the sideswipe incident in June of 2011 when the Complainant told him about it. "He said, they are not going to, you know, do nothing to me because I wasn't going but 1 mile an hour, wasn't doing nothing wrong, you know." (RX 60 at 38). T. Riggins testified to his understanding of how the sideswipe occurred, explaining that cars can get bumped out of the track, which the conductor might not know because he works 1,500-2,000 feet from the end of the track, and cars can still be humped to nearby tracks. T. Riggins testified that sometimes the tracks were overfilled. T. Riggins testified that he understood that some of the cars that were in the track in which the Complainant was working were sideswiped by another car coming off the hump. T. Riggins testified that it was standard procedure for the Respondent to investigate incidents, but that he was not sure who conducted the investigation. He testified that he was not involved in the investigation into the sideswipe.

T. Riggins testified that the downloads from the locomotive event recorder would show whether the RCO foreman had done something wrong. However, he testified that the downloads would not show whether a remote control foreman had properly protected a shove. When asked whether a foreman is expected to properly protect the shove, T. Riggins testified that "there's no way an RCO foreman can be on the head of a train or cut of cars you're coupling and protect the bottom." (RX 60 at 45). T. Riggins testified that the procedure changed after the sideswipe incident. He testified that the new procedure requires that if there is less than five car-lengths of room the whole group of tracks will be blocked out. T. Riggins testified that while he could not see how it would be possible for remote control foremen to comply with the rules regarding protecting the shove, the rules do apply to conductors and remote control foremen. T. Riggins testified that he did not know where the Complainant was on the track during the sideswipe and that he had no firsthand knowledge of the sideswipe incident.

T. Riggins testified that the Complainant told him that there would not be any charges related to the sideswipe incident based on the information from the engine downloads. He testified that at the time the Complainant told him this, he did not know if the investigation was still ongoing. T. Riggins explained that pursuant to the collective bargaining agreement, the Respondent had ten days in which to charge an employee with a rule violation and that even if the employee were told on the fifth day that there would be no charge the Respondent still had five days to enter a charge against the employee. T. Riggins testified that the Complainant called him on the morning of June 11 and informed him that the Respondent was entering charges against the Complainant based on the sideswipe incident. T. Riggins testified that the Complainant was upset during the phone call and that he recommended that the Complainant call the Employee Assistance Program counselors. T. Riggins testified that the Complainant had already left work when he called.

T. Riggins testified that B. Bennett called him after he had spoken with the Complainant. T. Riggins testified that B. Bennett told him, "I really need [the Respondent] to talk to me, just come see me." (RX 60 at 52). T. Riggins testified that he called the Complainant back after speaking with B. Bennett and that the Complainant said he was too upset to speak with B. Bennett. T. Riggins testified that he called B. Bennett back himself and asked B. Bennett to

"wait a couple days" and "let everything just kind of settle down." (RX 60 at 53). T. Riggins testified that he asked B. Bennett what they were doing and that B. Bennett told him the Respondent was entering an assessment against the Complainant, which B. Bennett characterized as "just an assessment, it ain't nothing." (RX 60 at 53). T. Riggins testified that he then called the vice general chairman to ask about assessments. T. Riggins testified he then called B. Bennett back to ask why the Complainant was being charged with a rule violation for failure to protect the shove and stated that he questioned B. Bennett's decision. T. Riggins testified that he assumed that it was B. Bennett himself who was charging the Complainant, but that he was not told that by B. Bennett. T. Riggins testified that B. Bennett said, "I really need to talk to him…before this gets blowed out of proportion." (RX 60 at 54).

T. Riggins testified he then called the Complainant back again, but that he could not recall what he said, but that he told the Complainant that he would not force him to meet with B. Bennett and that he offered to go with the Complainant to meet B. Bennett. T. Riggins testified that he then called B. Bennett back again, "and he said that this is just going to be, this is going to be ugly. There's going to be - - this is going to be blowed out of proportion." (RX 60 at 54). T. Riggins testified that he told B. Bennett he would not force the Complainant to come in and that he did not think the Complainant should go speak with B. Bennett at that time because "I could just tell he was upset in his voice, you know, he wasn't - - he wasn't irate or nothing. He just - - I could just tell he was upset, shaky, you know." (RX 60 at 55).

T. Riggins testified that he did not know why B. Bennett wanted to talk to the Complainant. He testified that that B. Bennett only told him he needed to talk to the Complainant, and that B. Bennett did not explain what he meant when he said he "didn't want it to get blown out of proportion." (RX 60 at 58). T. Riggins testified that he was aware of situations in which charges against an employee had been withdrawn before a hearing by the Respondent. T. Riggins testified that on Monday, June 13, there was a "union meeting" at which he and the Complainant discussed setting up a meeting to see B. Bennett, which he testified occurred the next day. T. Riggins testified that during the union meeting he and the Complainant mostly discussed the need for a meeting with B. Bennett and that he could not recall if they discussed the sideswipe incident.

T. Riggins testified that he learned the charge related to the sideswipe at the meeting he and the Complainant had with B. Bennett. He testified that "when we went up there he said that, you know, nobody tells him, no, that you're not going to come see me, he said." (RX 60 at 60). T. Riggins testified that B. Bennett told the Complainant that he was not going to be charged relating to the sideswipe but that he would be charged with a GR-2 violation. T. Riggins testified that an employee is not disciplined until after the hearing and agreed when asked that an employee would not be suspended without an investigation unless he signed a waiver. T. Riggins testified that the charge letter described why the Complainant was charged with a GR-2 violation, but that he did not recall B. Bennett mentioning the Complainant's meeting with T. Thornton at the time. T. Riggins testified that during the meeting with B. Bennett the Complainant appeared to be shocked by the news that he was going to be charged with a GR-2 violation but that everyone in the meeting was calm. He testified that the meeting lasted approximately twenty minutes.

T. Riggins testified that after the meeting, during the course of the investigation, he met with the Complainant to discuss the charge against him and the progress of the investigation, including gathering witnesses. T. Riggins testified that at around this time the Complainant told him that he used the word "bullshit" in his meeting with T. Thornton but that the Complainant told him he immediately apologized to her for using the word. (RX 60 at 73). When asked if the Complainant ever told him that he used the "F word" in his conversation with T. Thornton, T. Riggins testified "he said the BS word, and he said the S word… but he never used the F word." (RX 60 at 73). T. Riggins testified that he was sure the Complainant did not mention the FRA to him but that he could not recall if the Complainant told him he threatened to call a lawyer during his conversation with T. Thornton.

T. Riggins testified that employees can bring safety concerns to the attention of management at safety meetings, which occur once a month. T. Riggins testified that employees also bring safety concerns directly to him.

T. Riggins testified that no hearing was held regarding the sideswipe charge. He testified that on June 11, he was able to look at the Complainant's attendance record to see that he was initially marked as being "sick" but then, "just like a minute later, they had him refusing to work." (RX 60 at 87). T. Riggins testified that he did not know who entered these markings or why, but that only management could have marked the Complainant as refusing to work. T. Riggins testified that being marked as refusing to work would affect pay, though being marked sick would also cause lost pay. T. Riggins testified that being marked as refusing to work "does go on your record as like a missed call… if you are sick, you can get a doctor's excuse and…they'll excuse it. If you miss work, you don't get an excuse. It goes - - holds against your attendance." (RX 60 at 93-94).

T. Riggins testified that the Complainant was terminated for the GR-2 violation. Referring to the termination letter dated August 3, he testified that the Complainant did not tell him that he raised his voice when speaking with T. Thornton but that the Complainant did admit to using profanity when speaking with T. Thornton. Still referring to the termination letter, specifically to the finding that the Complainant made the statement that he would "shut the yard down," T. Riggins testified that the Complainant told him, "I didn't tell them that…I didn't never tell them that." (RX 60 at 97). T. Riggins testified that J. Dixon was a witness to the conversation between the Complainant and T. Thornton and that in preparing for the investigation J. Dixon told him that he did not hear the Complainant raise his voice or see the Complainant act irate or throw his hands up.

T. Riggins testified that he did not believe that the Complainant's termination was justified and that he believed "it was like a little bit of retaliation because we didn't go to see Mr. Bennett" about the sideswipe incident. (RX 60 at101). T. Riggins also testified he believed that the Complainant's being marked as refusing to work was for the same reason. When asked if he was aware of any safety complaints made by the Complainant, T. Riggins testified that he could not recall offhand but that

> "he did mention that after the sideswipe, he was getting charged with that. You know, that's not right. I mean, how can he - - and it is a safety thing to me. When you overfill a track that you're in there coupling. And I think - - and it's

> happened a lot of times before, the sideswipes. And it bothers me, you know, because I used to be down there coupling. I'm afraid if I get in front of that track and if something sideswipes and knocks another car down, it's going to - - you know what I'm saying."

(RX 60 at 103). When asked what the Complainant did not think was right, T. Riggins responded, "overfilling them tracks… without having protection from the B Tower." (RX 60 at 103). T. Riggins testified that the Complainant told him that it was not right to overfill the tracks but that he did not know if the Complainant told anybody else.

T. Riggins testified that he believed the Complainant's termination was appealed before an arbitration board. T. Riggins testified he believed after the Complainant's termination he followed his normal practice of contacting D. Jones to request leniency on behalf of the terminated employee. T. Riggins testified that appeals are handled by the UTU general chairman's office.

T. Riggins testified that B. Bennett informed him of the altercation with the Complainant at the Rivers Bar in March of 2012. T. Riggins testified that B. Bennett "just said he was scared and all that stuff. And he said, don't tell nobody." (RX 60 at 108). T. Riggins testified that he did not know whether the Respondent brought charges against the Complainant relating to the incident at the Rivers Bar. T. Riggins testified that it was his understanding that the Respondent would have held a hearing regarding the Rivers Bar incident if the Complainant had been reinstated. Referring to several e-mails admitted as exhibits to the deposition, T. Riggins testified that he then recalled that the Respondent was going to charge the Complainant in association with the Rivers Bar incident but that he suggested postponing the investigation into the charge indefinitely because the Complainant had already been terminated. T. Riggins testified that while the Complainant's appeal of his termination was pending, he was not an employee of the Respondent, or "when you get terminated, you're fired until …you're awarded to come back." (RX 60 at 114).

T. Riggins testified that he could not identify any specific instance, other than the Complainant, in which an employee used profanity when talking to a manager. He testified that when he was local chairman, his territory was Waycross and employees who go on the road out of Waycross. He testified that he would not be aware of disciplinary charges that were brought against UTU-represented employees from other local union chapters unless other local representatives contacted him.

On cross examination, referring to e-mails admitted as exhibits to the deposition, T. Riggins testified that he requested information from D. Jones whether a waiver will be considered in the Complainant's case. Based on this email, T. Riggins testified that as of August 24, 2011, he did not know that the Complainant had been dismissed or he would not have sent that e-mail. Referring to the e-mail from Fran Saul dated August 3, 2011, attached to the deposition as exhibit P2, T. Riggins testified that he did not receive this e-mail and noted that his e-mail address was not listed as a recipient of the e-mail, nor was he a member of the e-mail lists that were included in the addressees of the e-mail.

T. Riggins testified that he knew Mr. Middleton from working at the Waycross Yard. He testified that Mr. Middleton was working at the Waycross Yard at the same time as the Complainant and T. Thornton worked at the yard. Referring to Mr. Middleton's disciplinary history, which was attached as an exhibit to the deposition and which is summarized below at CX 16, T. Riggins testified that he had heard about the incident, dated November 14, 2009, in which Mr. Middleton used profanity over the radio, but that he could not recall the particular words used. T. Riggins testified that the entry "Ref MGR" in the far right column of the exhibit means "referring manager" and that for the incident in question that was Trainmaster, T. Thornton. (RX 60 at 135). Referring to the same entry in the exhibit, T. Riggins testified that the term "IRC" means counseling or coaching, but does not constitute a "write up." (RX 60 at 135). T. Riggins testified that similar counseling was not offered to the Complainant.

Referring to another incident in Mr. Middleton's disciplinary history dated March 30, 2009, which resulted in three sets of trucks derailing, T. Riggins testified that Mr. Middleton was offered a waiver and was charged fifteen days off for that incident and confirmed that the derailment occurred before the use of profanity over the radio. Referring to the incident dated April 25, 2006, in which Mr. Middleton was charged in another incident resulting in the derailment of a car, T. Riggins explained that a timeout means "you don't really get nothing. I mean, they talk to you maybe. Almost like a coach and counseling. But what a time out is, you go up there and you - - you review that rule and then you go back to work." (RX 60 at 139). Referring to another incident dated March 22, 2006, in which Mr. Middleton exceeded maximum authorized speed in the yard, T. Riggins testified that "ICI" also means coaching and counseling. (RX 60 at 140). Referring to another incident dated March 7, 2005, in which Mr. Middleton failed to stretch cars to make sure they were coupled, which could have resulted in a derailment, T. Riggins affirmed that Mr. Middleton got another coaching and counseling session. T. Riggins testified that Mr. Middleton still worked for the Respondent.

T. Riggins explained his understanding of the difference between using profanity and "cussing somebody out." (RX 60 141-142). He testified that the instances of profanity he described in his earlier testimony with the yardmaster and with T. Thornton were examples of being cussed out because "it was directed towards me." (RX 60 at 142). T. Riggins differentiated these examples from a hypothetical statement by Complainant's counsel that "the charges against [the Complainant] are bullshit" because the term is not being directed at a person but is only being used to describe. (RX 60 at 142). T. Riggins testified that he believed, though he was not present for the conversation, that when the Complainant was talking to T. Thornton and described the decision to give him an assessment for the sideswipe incident was "bullshit," the Complainant was "just using profanity." (RX 60 at 143).

T. Riggins testified that T. Thornton did not apologize to him for calling him a smartass, but that he did not make a formal complaint about the incident because he understood that T. Thornton was under a lot of stress that day. T. Riggins testified that T. Thornton retired voluntarily from working with the Respondent based on years in service. He testified that the Complainant was under stress on June 11, 2011, because of the recent deaths of two friends and because of being first told that no charges were going to be assessed relating to the sideswipe incident and then being told he would be charged. T. Riggins testified that he did not believe the yardmaster was

under stress when he directed profanity at T. Riggins. T. Riggins testified that he could not recall if the yardmaster was written up for the incident but that he still works for the Respondent.

T. Riggins testified that he occasionally has heard employees use profanity generally when speaking with managers in the Waycross Yard, but not while "fussing or arguing." (RX 60 at 148). He testified that while he has experienced it twice himself, he has not seen any employees "cuss out somebody." (RX 60 at 148). T. Riggins testified that he had never seen anybody disciplined for a GR-2 violation because they used profanity, nor had he seen anyone dismissed for a GR-2 violation other than the Complainant.

T. Riggins described conditions in the bowl while coupling cars stating that if a conductor is working coupling cars and cars are also being humped to the track next to him, he only has about three feet of room so he has to pay attention to both the cars he is coupling and the cars coming down the track next to him. T. Riggins testified that the job the Complainant was supposed to work, that J. Dixon ultimately took over, on the morning of the Complainant's conversation with T. Thornton also required concentration to stay safe. T. Riggins testified that under the collective bargaining agreement, the Complainant was not required to return to work at the request of management if he was marked off sick.

T. Riggins testified that B. Bennett did not explain what he meant when he said "before this gets blown out of proportion." (RX 60 at 156). T. Riggins testified B. Bennett did not tell him what T. Thornton had told B. Bennett about the incident with the Complainant. T. Riggins testified that the change in procedure for coupling on tracks with less than five car lengths of room came not long after the sideswipe incident involving the Complainant. T. Riggins testified that the Complainant was never charged in relation to the sideswipe incident. He testified that B. Bennett did not tell him that the assessment for the sideswipe was only being entered to ensure compliance with the ten-day time period in the collective bargaining agreement but that it might later be withdrawn. T. Riggins testified that he was never told why the Complainant was not charged for the sideswipe incident. He testified that he believed a GR-2 violation is more serious than a failure to protect the shove.

T. Riggins testified that the collective bargaining agreement required certified mail delivery of a charge, not hand delivery, as had been required under the old contract. He testified that an employee typically finds out he is being charged when he receives the charge letter in the mail.

T. Riggins testified that only management can mark an employee as refusing to work and that normally this is done as a result of the employee calling management to inform them he is refusing to work. T. Riggins testified that an employee who is not in management can only direct that he be marked as sick.

T. Riggins testified that he was not told on June 11 that the Complainant would be charged with a GR-2 violation.

T. Riggins testified that crowded tracks had resulted in freight cars backing up into the switch area and fouling tracks "many a time out there." (RX 60 at 171). He testified that management had to know about these incidents because trainmasters had to investigate following a sideswipe.

T. Riggins testified that the Respondent was required to report the sideswipe incident in which the Complainant was involved based on the dollar amount of damage. He testified that the Respondent was also required to conduct an investigation.

T. Riggins testified that fouling the switch is a safety issue. He testified that the new rule about five car-lengths on the track that was implemented after the sideswipe incident resulted in extra room in case cars do move back toward the switch.

T. Riggins testified that a similar situation exists for engines if the tracks are crowded but that he could not recall if any employees were ever disciplined for that. T. Riggins testified that a conductor doing the RCO function could walk all the way to the engine to see the end of the train, but that it would take about 15-20 minutes. He testified the conductor would then have to walk all the way back to the joint to couple cars. T. Riggins testified that this would slow down production in the Waycross Yard "big time." (RX 60 at 178).

T. Riggins testified that on June 11th the Complainant was not acting angry, "he was just nervy acting and upset." (RX 60 at 179). He agreed that the Complainant was "shaken." (RX 60 at 179). T. Riggins testified that he believed the hearing officer was trying to make the record look as though the Complainant was misbehaving by telling him on the record that he was acting upset.

T. Riggins testified that an employee will not be paid if he is marked sick or if he is marked as refusing to work. However, if an employee has a doctor's note for the sick day, "it won't be counted against your … availability." (RX 60 at 182).

T. Riggins testified that B. Bennett called him to inform him of the Rivers Bar incident. T. Riggins testified that B. Bennett told him that he was "scared for his life. He had run across the four lanes, is all I can remember." (RX 60 at 184). T. Riggins testified that B. Bennett also told him not to tell anyone, but did not explain why not. T. Riggins testified that he did not understand why B. Bennett had called him. T. Riggins testified that B. Bennett had not called him in relation to another incident T. Riggins had heard about involving another Respondent employee.

T. Riggins testified that B. Bennett did not tell him anything on June 11, 2011, about the Complainant acting inappropriately earlier that day. T. Riggins testified that B. Bennett did mention the assessment relating to the sideswipe and that the Complainant should not blow it out of proportion. T. Riggins testified there was no mention of any GR-2 violation or any misbehavior by the Complainant. He testified that B. Bennett did not discuss during the phone calls that the Complainant told T. Thornton that he might talk to a lawyer or that the Complainant mentioned an investigation by the FRA.

T. Riggins testified that previous incidents occurred in the Waycross Yard in which conductors inadvertently caused a sideswipe while coupling cars, but that he did not know if the conductors involved were disciplined because that was before his time as a local chairman. He testified that while he received additional information about employee discipline while he was local chairman,

he often heard talk around the yard about employee discipline. T. Riggins testified that to his knowledge nobody else who inadvertently caused a sideswipe on a crowded track while coupling was disciplined.

T. Riggins testified that the Complainant filed an appeal of his termination, which would go to the "public law board." (RX 60 at 192). T. Riggins testified that he was not involved in the Complainant's appeal to the board, and that to his knowledge no one from the union appeared before the board on the Complainant's behalf. T. Riggins testified that the Complainant was required to be notified of the Board's work on the appeal, but to his knowledge the Complainant was not notified. T. Riggins testified that he generally tries to add comments to hearing transcripts but that one of the reasons he filed an appeal in the Complainant's case was that he was not able to get his comments in on time. T. Riggins testified that he was not asked by the union to assist in the Complainant's appeal.

T. Riggins testified that during the time he worked with the Complainant, he never observed the Complainant act in an unprofessional manner, act in a boisterous or profane manner, or violate Rule GR-2. T. Riggins testified that the Complainant's natural volume of speech is "kind of loud." (RX 60 at 201).

T. Riggins testified that the change in policy when a track has less than five car lengths of room was communicated by bulletin. He testified that he believed the change in procedure had changed the potential for collisions because he had not heard of any more lately.

On re-direct examination, referring to Mr. Middleton's disciplinary history, T. Riggins testified that he did not know what Mr. Middleton said over the radio that day, he did not know if the profane language was directed at anyone in particular, and that he had no firsthand knowledge of the incident at all.

Referring to his own e-mail dated August 24, 2011, attached as an exhibit to the deposition, T. Riggins testified that he did not recall any issues with the delivery of the Complainant's termination letter. T. Riggins testified that he could not recall any other instance in which a hearing was held and several weeks later he had not been informed of the outcome of the hearing.

Referring to his earlier testimony about conductors involved in sideswipes, T. Riggins testified that it was possible that the conductors had been disciplined in relation to those incidents but that he did not know about it.

T. Riggins testified that he had never been a manager and that he was not familiar with the process of how a charge letter is generated. T. Riggins testified that as of June 11, 2011, the Complainant could have been charged based on the sideswipe incident if the Respondent could have had a letter delivered by mail within the ten-day period from their learning of the incident.

T. Riggins testified that he was not aware of any employees who use the "F-word" when talking to a manager. (RX 60 at 212).

T. Riggins testified that a majority of the talk regarding disciplined assessed to other employees involves Waycross Yard employees, as opposed to employees at other Respondent rail yards.

Deposition Testimony of Mr. Donald Jones (RX 61)

D. Jones testified by deposition on August 19, 2014. On direct examination he testified that he had worked for the Respondent for 34 years, that he was then out on disability, but that his previous position was as division manager of the Jacksonville division, which he had held for approximately five and a half years. D. Jones testified that his responsibilities in that position included employee discipline. He testified that when an incident occurred he would "review most of those and render discipline as to the status of the employee based on the information I gathered." (RX 61 at 9). D. Jones testified that while he was division manager in Jacksonville, the Complainant was an employee of the division. He testified that the Complainant was hired by the Respondent in approximately 2005 and worked for the Respondent until the incident in question, but that the Complainant did not work for the Jacksonville division the entire time.

D. Jones testified that he learned about the sideswipe incident involving the Complainant in a phone call from B. Bennett. D. Jones testified that the Respondent investigated the incident as they would all safety incidents. D. Jones testified that initially the Respondent believed the incident was a "human factor situation" but later found signal issues that were "less than desirable, so we had a pretty robust action plan to correct several things when we were done." (RX 61 at 13). D. Jones testified that in response to the investigation the Respondent initially charged the Complainant, but then rescinded the charge.

D. Jones testified that he did not personally investigate the incident but that B. Bennett did. D. Jones testified that he did not personally speak with the Complainant during the investigation and was not sure if he had ever done so. D. Jones testified that the Complainant never raised any safety concerns or issues with him in connection with the sideswipe incident, nor had he ever done so. D. Jones testified that at no point during the investigation of the sideswipe incident did he become aware of any safety concerns or issues that the Complainant had raised with anyone. D. Jones testified that he had no concern that he would be disciplined in relation to the sideswipe incident and that he did not consider disciplining any managers as a result of the sideswipe incident.

D. Jones testified that he later became aware of the incident between the Complainant and T. Thornton, a trainmaster in his division. D. Jones testified that he had known T. Thornton for about 15-20 years and as a manager considered her to be good with people- hard on the rules but also aware of employees' needs. D. Jones testified that B. Bennett informed him of the incident between the Complainant and T. Thornton in a phone call. He testified that B. Bennett told him that the Complainant "cussed out" T. Thornton. (RX 61 at 17). He testified that B. Bennett was "pretty animated. ..I think he was disappointed in [the Complainant], and I think he was also shook up that … the profanity and everything else was used." (RX 61 at 17). D. Jones testified that B. Bennett provided details of the incident including that "the 'f' word was used and some other things, so that - - it kind of gave me the impression that it was a pretty volatile situation." (RX 61 at 17).

D. Jones testified that the next day he also spoke to T. Thornton about the incident and his impression was that "she seemed a little fearful about the blowup and - - and sort of taken back by it. So obviously she was fearful and concerned, without a doubt." (RX 61 at 17). He testified that T. Thornton said the Complainant "went off on her and began cussing and carrying on." (RX 61 at 18). He testified that T. Thornton told him that the Complainant said, "this is f'ing BS and… it's a bunch of crap." (RX 61 at 18).

D. Jones testified that he did not believe the use of profanity was common on the railroad, though he believed "shop talk" existed, "But it's not acceptable in…any form." (RX 61 at 19). D. Jones testified that he did not accept the use of profanity by employees or managers and that he would correct it if he heard someone use profanity at work. "I took a pretty hard line on that, especially with the managers. That was just not the way to talk to people…" (RX 61 at 19). D. Jones testified that after speaking with her, he told T. Thornton that the situation would be handled, "we'll do a formal investigation and we'll do the right thing." (RX 61 at 19).

D. Jones testified that after hearing from B. Bennett and T. Thornton,

> "I thought it would be best if [the Complainant] be removed from service because it was a volatile situation. I didn't think it was going to be any benefit to him or to [the Respondent]…in that condition, to be working. I think I was afraid that he would put himself in danger or others. So I thought a cooling-off period would be appropriate and that's what I did."

(RX 61 at 20). Referring to the charge letter, summarized below at RX 13 and attached as an exhibit to his deposition, D. Jones testified that the letter was issued by R. Logan, his assistant division manager at the time. D. Jones explained that the investigation to which the letter referred is "the railroad's method of determining facts, getting all the witnesses together and getting a full transcript of that so that we can make good decisions about how to move forward with the discipline, if there is any." (RX 61 at 21).

D. Jones testified that the charge against the Complainant was GR-2, which covers "conduct unbecoming to an employee." (RX 61 at 22). Referring to the excerpt of GR-2 from the rulebook, summarized below at RX 39, D. Jones testified that a GR-2 violation is considered a "major" offense under the Respondent's progressive discipline policy. (RX 61 at 24). He testified that the discipline policy permits discipline up to and including dismissal for major offenses. D. Jones testified that he believed that the classification as a major offense was appropriate in this case because of the language used, the confrontational manner, "and specifically directing it directly at an officer of the company." (RX 61 at 25).

D. Jones testified that a waiver might occur if the company learns additional facts during the investigation that might lead to waiving some or all of the charges or reducing the discipline. D. Jones testified that waivers are "not uncommon. But at the same time, on a major, it's… not very likely." (RX 61 at 26). D. Jones testified that a waiver was not discussed much because of the seriousness of the offense. Referring to the e-mail from T. Lewis in Labor Relations recommending a waiver, attached as an exhibit to D. Jones' deposition and summarized below at RX 12, D. Jones testified that while Labor Relations made a recommendation, he made the ultimate decision not to offer a waiver in the Complainant's case. D. Jones testified that he decided not to offer a waiver because "typically the GR-2 is a very serious charge, and in that

case, it not only is detrimental at the incident, but, also, it can really [a]ffect the workplace as a whole." (RX 61 at 27). D. Jones testified that there were many times that he differed with Labor Relations on the handling of an incident.

D. Jones testified that after a hearing is held he and R. Logan would review the transcript and speak with the local supervisor, B. Bennett in this case, to determine if discipline was appropriate. D. Jones testified that he reviewed the transcript of the investigatory hearing prior to making a decision regarding the Complainant. Referring to the Complainant's employee work history, summarized below at RX 2, D. Jones testified that the Complainant had already had a major violation, which helped D. Jones decide to terminate the Complainant. D. Jones testified that he received input from Mr. Garcia in Labor Relations in his transcript review, summarized below at RX 16. D. Jones testified that Mr. Garcia recommended a 60-day suspension in the Complainant's case, but that he did not agree with that recommendation due to the seriousness of the charge, and because he was "not a fan" of long suspensions due to the financial impact on the employee. "So I thought better that we terminate and then review it, and you know, if possible later on, if there was anything we were going to change, then we could do a reinstatement." (RX 61 at 33).

D. Jones testified that R. Logan recommended termination because of the seriousness of the charge and the type of behavior involved. D. Jones testified that he believed dismissal was the appropriate penalty because, "it's very simply something that can affect the entire workforce if left unchecked. So a termination in my mind was the right thing to do." (RX 61 at 34). D. Jones testified that the investigation revealed that the Complainant was very irate and admitted to cussing. D. Jones testified that T. Thornton's reaction to the incident also affected his decision because D. Jones' impression was that she was scared and uncomfortable managing the Complainant because of the "blowup." (RX 61 at 35). D. Jones testified that T. Thornton's testimony in the investigatory hearing, that the Complainant's actions did not make her feel endangered, did not impact his decision. He testified that "I know what I hear from that conversation with her right after the incident. I would expect over time that in the investigation, it might be a little …less volatile…" (RX 61 at 36-37).

Referring to the termination letter summarized below at RX 19, D. Jones testified that the letter is generated automatically and contain his electronic signature, but that he approves them. D. Jones testified that any safety concerns or issues that the Complainant may have raised at any time did not play any role at all in his decision to dismiss the Complainant. He testified that he disciplined other employees for GR-2 violations. Referring to the spreadsheet of GR-2 incidents in the Jacksonville Division attached as Exhibit 8 to D. Jones' deposition summarized below, D. Jones identified incidents numbered 147770, 163059, 179798, 190013, and 216690 as similar to the Complainant's. He testified that the employee involved in 16059 resigned in lieu of being dismissed and that the other four incidents resulted in dismissal. D. Jones noted that 179798 related to an employee's conduct at a hotel, not on company property. D. Jones noted that 216690 also related to train handling issues in addition to the GR-2 violation. Referring to the materials attached as Exhibit 9 to D. Jones' deposition and marked as RX 61 at 213-224, D. Jones testified that the materials are employee histories of the employees involved in the GR-2 violation incidents he identified. D. Jones testified that the materials attached as Exhibit 10 to

the deposition and marked as RX 61 at 225-228 are the dismissal letters of the employees involved in the GR-2 violation incidents.

D. Jones testified that in addition to the employees whom he discussed as summarized above, he also disciplined at least four or five managers for violating GR-2; one manager he removed from his management position and another he dismissed.

D. Jones testified that approximately four or five months after the Complainant was dismissed, he spoke with the UTU general chairman, who would sometimes call in cases of dismissal to inquire about the possibility of leniency or reinstatement. D. Jones testified that he told the chairman that "we wanted to sit tight at this time, but we would talk again about it." (RX 61 at 46). D. Jones testified that "employee engagement" sessions are a management tool "aimed at developing employees and changing their behavior to perform better in the future." (RX 61 at 47). D. Jones testified that at the time of the chairman's phone call, he thought that "in the future that we could consider [participation in the employee engagement process] but then the circumstances changed. So we didn't do that." (RX 61 at 47). D. Jones testified that the March 2012 River Bar incident in which B. Bennett was attacked was the change in circumstances to which he was referring. D. Jones testified that B. Bennett informed him of the incident the morning after it occurred. D. Jones testified that he understood from the phone call with B. Bennett[8] that B. Bennett was "extremely scared and very animated and was really seeking my help as to how best to proceed. And at that point in time, I told him that…make sure that the police are fully involved, and at that point in time, we also contacted the special agents at the facility to make sure that…[the Complainant] didn't come on the property and attempt to do anything else." (RX 61 at 49). D. Jones testified that B. Bennett reported that the Complainant had pulled a knife on him and chased him through the parking lot. D. Jones testified that he was concerned that the Complainant not be a threat to himself or to others. D. Jones testified that he asked B. Bennett to document the incident and that in response to receiving the documentation, he notified the company security force. D. Jones testified that he also notified Labor Relations that there would be another charge relating to this incident. He testified that he also informed his boss about the situation and directed B. Bennett to enter an assessment regarding the incident. D. Jones testified that he asked that an assessment be entered because the Complainant's case had not yet gone to arbitration. D. Jones testified that none of the actions he took in response to this incident related to safety concerns the Complainant may have raised. D. Jones testified that a charge letter was issued relating to the incident but that an investigation was not held. D. Jones testified that had an investigation been held, and the facts as relayed to him by B. Bennett been proven, he would consider dismissal appropriate discipline because the incident was "certainly another clear example of conduct unbecoming an employee." (RX 61 at 56). D. Jones testified that no investigation hearing was held because the initial dismissal was upheld in arbitration "so there was no need to dismiss him the second time." (RX 61 at 57).

D. Jones testified that he was familiar with the FRSA and that the company policy, as communicated in the letter from the Respondent CEO summarized below at RX 50, was to

[8] The Complainant objected on the grounds of hearsay to the testimony regarding what Mr. Bennett told Mr. Jones in the phone call. The Parties agreed this presiding Judge could make a ruling following the deposition. Mr. Jones' testimony regarding what Mr. Bennett told him on the phone call is admitted for the limited purpose of its effect on Mr. Jones' decision not to reinstate the Complainant, not for the truth of the matter.

encourage employees to report safety issues. D. Jones testified that under company policy it was "totally inappropriate" to retaliate against employees for raising safety concerns and that he both received training on that policy and in turn trained managers on that policy. D. Jones testified that he understood that he could be subject to discipline for failure to comply with that policy. D. Jones testified that he did not take any action because the Complainant had raised safety concerns or reported safety issues and that at no time in his dealings with the Complainant had anyone on his management team reported that the Complainant had raised any safety concerns or issues with them.

On cross examination, D. Jones testified that he was not present in the Waycross Yard for the sideswipe incident, the related investigation, the conversation between T. Thornton or the Complainant. D. Jones testified that B. Bennett and representatives from the signals department briefed him on the sideswipe incident. D. Jones testified that B. Bennett and T. Thornton described the June 11, 2011, conversation between T. Thornton and the Complainant to him. D. Jones testified that as a division manager, he typically relied on lower level managers to communicate what happens in the yards and other locations within the division. When asked whether he assumed that what his managers told him is true, D. Jones answered, "In some cases, yes. But there's typically a great deal of questions that I would ask to make sure that I get the full understanding as to what happened related to any incident." (RX 61 at 65).

D. Jones testified that he approved the GR-2 charge against the Complainant and that the charge was initiated by B. Bennett and T. Thornton, with some input from R. Logan. D. Jones testified that both B. Bennett and T. Thornton can initiate discipline.

D. Jones testified that he could not recall the exact words T. Thornton used when he spoke with her, but that it was his impression that she was scared following her conversation with the Complainant. D. Jones testified that he read the transcript of the investigatory hearing in its entirety. D. Jones testified that the e-mail summary by Mr. Garcia in Labor Relations functioned as a procedural check to ensure the hearing was procedurally correct. D. Jones testified that he did not just rely on the summary from Mr. Garcia and that he read the transcript.

When asked whether he would agree that the Complainant would not have been charged with a GR-2 violation but for T. Thornton and B. Bennett reporting it to him, D. Jones testified that he did not believe the charge had anything to do with them; "If I had become aware of it, even from a fellow employee, I would have acted in the same way." (RX 61 at 71). D. Jones testified that B. Bennett and T. Thornton could have initiated the GR-2 charge against the Complainant without his approval, but that typical protocol for a major charge, which they followed in this case, included contacting him first.

D. Jones testified that when he reviewed the July 6, 2011, hearing testimony of T. Thornton, he did not consider her testimony that she did not feel threatened to be inconsistent with his impression that she was scared when she called him because some time had passed since the incident.

D. Jones testified that an FRA reportable incident is considered a safety issue. Referring to T. Thornton's e-mail to herself recounting her conversation with the Complainant, summarized

below at RX 10, D. Jones testified that he saw this e-mail "a couple days" after the incident and that the e-mail was read into the record of the investigational hearing. (RX 61 at 73). D. Jones testified that he was familiar with the contents of this e-mail before the decision to terminate the Complainant was made. He testified that he considered the e-mail a recap of what the Complainant said, "I treated that as his own words," rather than as safety issues. (RX 61 at 74). Referring to the quote from T. Thornton's e-mail at RX 10 reading "advised him assessment had been input due to sideswipe incident", and then when asked whether he would agree that a conversation about a sideswipe incident is a conversation about a safety issue, D. Jones testified that it is a conversation about a safety incident.

When asked whether the statement in T. Thornton's e-mail at RX 10 that "He immediately made comments that he would shut this yard down, would walk every track, stop pulling cars" was a statement regarding a hazardous safety condition at the Waycross Yard, D. Jones testified that he considered the statement to be production-related rather than safety-related. (RX 61 at 75). When asked whether he would consider the phrase "would call a lawyer" to be a conversation about a hazardous safety condition at the Waycross Yard, D. Jones answered "no." (RX 61 at 75). When asked whether he would consider the statement, "He said he didn't make any waves about he could have been killed during the incident," to be a conversation about a safety issue at the Waycross Yard, D. Jones testified that he did not, " because it was not specific and I took it as a general statement on his behalf." (RX 61 at 75).

Referring still to the statement in T. Thornton's e-mail at RX 10 that "we had just killed someone in the bowl," D. Jones agreed that "we" meant the Respondent, and testified that he "took it to mean him and the Waycross team." (RX 61 at 75). D. Jones testified that while the fatal accident to which the Complainant was referring was a safety issue, he had "fully investigated that one, as well, and actually on-site. So I didn't relate the two." (RX 61 at 76). When asked whether the statement "We knew we were in the wrong because we put in new procedures to prevent this from happening again" was a conversation or report of a safety issue, D. Jones testified that in his opinion it was not. When asked whether the statement "Had five crews to keep up, and he was afraid he might get someone hurt, and he had to leave, which he did," was a conversation about a hazardous safety condition, D. Jones testified that it was not and that he "interpreted that more of his state of mind and his ability to perform his duties." (RX 61 at 77).

D. Jones testified that a report about a sideswipe incident was a safety issue. He also testified that a conversation about an FRA reportable incident is a conversation about a safety issue. D. Jones testified that it is not "okay" to discipline an employee for reporting a hazardous safety condition or refusing to work under hazardous safety conditions. He testified that there have been situations in which employees have refused to work under conditions that "we later found that it was not safety-related" and that those employees were disciplined. (RX 61 at 78). D. Jones testified that not only is reporting a hazardous safety condition protected activity under the FRSA, the Respondent also encourages people to report "anything that will improve the workplace, so it was not really related to the federal safety act. It was more of the way we did business. We wanted people to bring up things to improve our safety program." (RX 61 at 78-79).

D. Jones testified that based on the description by T. Thornton of the conversation, he did not believe the Complainant was reporting a hazardous safety condition on June 11, 2011. D. Jones testified that he also did not believe that the Complainant was expressing a refusal to work under hazardous safety conditions when he told T. Thornton that he would have to walk every track and call a lawyer.

When asked whether it was "okay" to discipline an employee who uses profanity while reporting a safety concern, D. Jones testified that "they are two separate things. We expect people to not use profanity, and if it's related to a safety issue, that's treated separately. So in this case, it was more about his conduct and his use of language that precipitated the charge." (RX 61 at 80). When asked whether he would approve a GR-2 charge against an employee who used profanity while making a safety report, D. Jones testified that, "We encourage people to report safety incidents. It is not acceptable to conduct yourself using vulgar language and being discourteous to report that… And we would react to the safety concern, but we would also handle the conduct." (RX 61 at 80). When asked what he meant by "handle the conduct" D. Jones testified that the safety concern and the inappropriate behavior would be handled separately. He testified that "We would react to the safety complaint because we want our employees to be safe and go home the right way, the same way they came to work. But if that was presented in a manner that was … not courteous and not civil, that would also be dealt with, as well." (RX 61 at 82).

Referring to the e-mail from T. Thornton at RX 10, D. Jones testified that the language in the e-mail that gave rise to the GR-2 violation and decision to terminate was the part stating, "very irate cursing and carrying on." (RX 61 at 82). D. Jones reiterated that a conversation about an FRA incident is necessarily a conversation about safety, "certainly as a part of it," and that a sideswipe incident is also a safety issue. (RX 61 at 83).

D. Jones testified that he visited the Waycross Yard periodically to participate in safety celebrations and town hall meetings. He testified that B. Bennett and other managers were typically with him when he went around the Yard. D. Jones testified that he did not think profanity use was common in the work environment. When asked if he would be surprised to learn that T. Thornton had testified that profanity is commonly used in the Waycross Yard, D. Jones stated that, "If she did, I would have hoped she handled it because that's not what we accept. That's for sure." (RX 61 at 85). D. Jones testified that it had never been brought to his attention that T. Thornton had used profanity with one of her employees and that if no one made a report of the incident, then he would not find out about it. D. Jones testified that if T. Thornton heard profanity used over the radio, but did not bring it to his attention, he would not necessarily find out about it. D. Jones testified that the local managers, such as T. Thornton, would have a better feel for the frequency of use of profanity in the Waycross yard than he would.

Referring to the employee history of Mr. Middleton, summarized below at CX 16, D. Jones testified that the IRC suggested by T. Thornton in response to the violation described as "Remote control foreman using profane language over a radio on November 14, 2011, means "incident review committee." (RX 61 at 88). D. Jones testified that an incident review committee involves labor leaders and the safety committee meeting with the employee and that the disposition marking of "ICI" means "informal corrective instruction." (RX 61 at 88). D. Jones testified that the notation that the charge was "Removed 5/12/2012, removed from consideration due to policy

removal provisions" refers to a policy in which charges are removed after a certain period of time, which is accomplished automatically by the computer system. (RX 61 at 89). D. Jones testified that he was not involved in dealing with Mr. Middleton's use of profanity at the Waycross Yard. D. Jones testified that Mr. Middleton's use of profanity was a violation of the GR-2 policy. When asked whether the charge was a "major," D. Jones stated, "Yes. I'd have to have more facts about it, but certainly profanity…would fit the bill." (RX 61 at 90). When asked why he would need more facts if any use of profanity is a violation of the GR-2 rule, D. Jones stated that "I don't know what he said. And I don't know - - I wasn't involved with this so I don't know what he said. And it would be important to know that." (RX 61 at 90). When asked explicitly whether any use of profanity is a violation of the GR-2 rule, D. Jones answered, "yes." (RX 61 at 90). When asked if he expected that the managers in the Waycross Yard would charge an employee with a GR-2 violation every time they hear an employee use profanity, D. Jones answered, "I would expect that. I don't know the situations about this one, so I don't know the facts around it. But I would expect that if it was - - if it was profanity that they would correct it or deal with it." (RX 61 at 90). D. Jones testified that "there's discretion to some extent" when an employee uses profanity as to whether that use of profanity is a violation of the rule. (RX 61 at 91). D. Jones testified that the rule itself "is pretty clear" and that it states that the use of profanity is a violation of the rule. (RX 61 at 91).

D. Jones testified that there are three other "serious" rule violations recorded in Mr. Middleton's employee history- one in 2009, 2006 and 2005 each, two of which resulted in derailment. D. Jones testified that the Complainant was not responsible for any derailments before he was terminated, but he noted that the Complainant was responsible for "speeding, …which had a play in that." (RX 61 at 92). When asked whether Mr. Middleton had more serious or major violations than the Complainant did before using profanity, D. Jones testified that "I don't think the comparison's accurate. You know a major - - [the Complainant] had a major previously. This employee had some derailments. And we look at them independently. We don't look at them to compare to other employees. So I can't say that this one applies versus [the Complainant] or not." (RX 61 at 93). D. Jones testified that although Mr. Middleton also had a speeding violation, it was considered "serious" and not "major" due to the number of miles per hour over the limit he was going. D. Jones explained that derailments may be classified as "serious" and not "major," using a hypothetical situation to illustrate why each circumstance is different and to note that one wheel over would still be classified as a derailment.

D. Jones testified that it was his understanding that from June 5th through June 11th, there was an initial thought of classifying the sideswipe incident as a human factor incident, but that it was later changed to a switching problem. D. Jones testified that the day after the sideswipe incident there was a new directive relating to loading tracks issued to trainmasters. He testified that it is not typically the conductor's responsibility to decide how many cars are going to a certain track. When asked whether it was "error" to charge the Complainant with an assessment for the sideswipe that was ultimately found to be a signal issue, D. Jones testified that, "we didn't know that at the time. There were still facts being developed related to the signal issues, but it's his responsibility to protect - - what we call 'protecting the shove.'" (RX 61 at 100). When asked whether if it was unfair to charge the Complainant for the sideswipe incident if the real cause of the incident was a signal issue, D. Jones testified that it was not "if we didn't know all the facts. Many times we let the charge go against the crew to determine - - to get a fairer understanding of

their testimony…And if it's unfounded, then we handle it that way as part of the transcript." (RX 61 at 100-101). D. Jones testified that he knew "early on" that the Complainant would be given an assessment for the sideswipe incident before he heard from B. Bennett and T. Thornton about her conversation with the Complainant. D. Jones testified that at the time they were trying to prevent the incident from happening again so they were trying to figure out if the Complainant had any involvement, and that they were investigating the signal issues as well. D. Jones testified that he agreed with entering an assessment against the Complainant before determining whether or not the incident was the result of a signal issue.

When asked whether he agreed that it is disappointing news for an employee to be told that he is going to be assessed with a charge, D. Jones testified that that is "something that we certainly don't intend." (EX 61 at 103). D. Jones stated that he could not testify to an employee's specific reaction to being told he was being charged, but stated that "I'm sure they're not happy." (RX 61 at 104). He also testified that it is "disappointing for everyone because we've…dropped the ball in regard to safety." (RX 61 at 104).

Referring to the spreadsheet of GR-2 incidents in the Jacksonville Division attached as Exhibit 8 to D. Jones' deposition and marked as RX 61 at 211-212, D. Jones testified that he did not know how the chart was put together or whether there were a number of instances of GR-2 violations where the employee was not dismissed that were excluded from the chart as he did not compile it. D. Jones testified that he did not have a memory of what happened in these incidents other than the manager's description.

Referring to the e-mail from T. Thornton to D. Jones dated July 20, 2013, attached as exhibit 17 to D. Jones' deposition, D. Jones testified that he did not know why T. Thornton forwarded her original e-mail description of events with the Complainant to him approximately two years after the event.

D. Jones testified that in the event of an FRA reportable event, the Respondent is required to make a report available to the FRA regarding the handling of the incident and the preventative actions taken. D. Jones testified that if the source code for an incident was human error, the issue could be addressed with just retraining or disciplining the employee, whereas another type of source code might necessitate a physical change to the signal or track.

When asked whether it was the Respondent's practice to charge an employee with a rule violation if there's been damage to property or an injury, D. Jones testified that it was not. When asked whether it was the Respondent's practice to charge an employee with a rule violation when the employee had done nothing wrong, D. Jones responded, "Not to my knowledge, no." (RX 61 at 113). D. Jones agreed that it would be unfair to do so and testified that "we wouldn't charge people unless it was necessary." (RX 61 at 113). D. Jones testified that he was not involved in every decision to charge the many employees whom he supervised and that "there's discretion at the local level…on many of the issues. I get involved in most of the major ones and serious ones, but there's discretion at the local level, as well."(RX 61 at 113). D. Jones testified that employees are not assessed charges every time there is an FRA reportable accident and agreed that accidents sometimes happen without error by an employee.

D. Jones testified that he was aware of T. Thornton's description of the conversation in her e-mail dated June 11, 2011. He testified that at the time he made the decision to terminate the Complainant, he was relying in part upon information that he had received from T. Thornton regarding that conversation as well as on information from B. Bennett and the investigation transcript as well.

D. Jones testified that he was not personally familiar with the Rivers Bar and that B. Bennett did not mention if he had been intoxicated at the time of the incident. D. Jones testified that he took B. Bennett's written description at face value. D. Jones testified that he was not aware of any incidents in which B. Bennett has been involved and that none had been reported to him.

D. Jones testified that it could be faster for a conductor to see to the end of the train he was building than to walk back and forth each time he coupled cars, "but it also has to comply with the rule, where they have actual line of sight." (RX 61 at 120). D. Jones agreed that it was difficult to have lines of sight when it's dark or raining, or when the tracks on either side of the train are full, and that "that's why it's required that you actually have to - - walk it and… be ahead of the coupling." (RX 61 at 120).

Referring to the spreadsheet of GR-2 incidents in the Jacksonville Division attached as Exhibit 8 to D. Jones' deposition and marked as RX 61 at 211-212, D. Jones testified that the "leniency reinstatement" noted in one GR-2 incident in the exhibit appeared to have been a reinstatement by an arbiter. He also testified that if employees were identified through the employee engagement sessions that deserved a "second chance," he would meet with them and they might be reinstated. D. Jones testified that in the Complainant's case, "that probably would have happened, you know, as well." (RX 61 at 122). D. Jones testified clarifying that he was considering meeting with the Complainant, which did not guarantee reinstatement, but that "the situation changed, as you well know." (RX 61 at 123). D. Jones testified that between the time the Complainant was terminated in August of 2011, and the March of 2012 incident at the Rivers Bar, he did not bring in the Complainant to discuss reinstatement because it was too soon. D. Jones testified that there is no set time period following dismissal to do so, but that it was typically done six to eight months afterward.

D. Jones testified that before deciding to terminate the Complainant, he understood that the Complainant continued to work on the morning of his conversation with T. Thornton. He also testified that he read in the transcript J. Dixon's testimony that the Complainant was not waving his arms or hollering, and was not acting in an irate manner.

D. Jones testified that greater seniority would give an employee the opportunity to bid on certain jobs, including road jobs, because "the senior person would prevail in bidding on a job." (RX 61 at 130).

On re-direct examination, referring to T. Thornton's e-mail description of her conversation with the Complainant, dated June 11th, when asked whether the fact that the conversation between T. Thornton and the Complainant arose in connection with inputting an assessment for the sideswipe incident played any role in his decision to dismiss the Complainant, D. Jones testified that it had not played any role whatsoever. When asked whether the fact that the Complainant,

as relayed to him by T. Thornton, made statements to the effect that he could have been killed or that someone else had just been killed in the bowl played any role in his decision to dismiss the Complainant, D. Jones testified that it had not. When asked if the Complainant's statement that he was concerned about working and his requests to leave work played any role in his decision to dismiss the Complainant, D. Jones testified that it had not. D. Jones testified that he considered the incident a violation of GR-2 because "simply the language and…the way it was communicated to me, and it was my belief, substantiated by the transcript, that it was…conduct unbecoming an employee. It was vulgar language and it wasn't acceptable in the workplace." (RX 61 at 133).

D. Jones testified that he did not think it was unfair to put in an assessment against the Complainant because the investigation had not finished, "and we wanted to cover all the bases." (RX 61 at 134). D. Jones testified that under the collective bargaining agreement, they had ten days after the incident to enter a charge "So we wanted to be sure we met those deadlines as well." (RX 61 at 135).

On re-cross examination, referring to a string of e-mails between B. Bennett and Ms. Sweatt attached as Exhibit 18 to D. Jones' deposition, D. Jones testified that the e-mails showed "the progression of the investigation. And up to a certain point, it was considered a human factor, and then at this point, as you point out, on the 15th [of June 2011], it changes to a signal cause." (RX 61 at 139). When asked why the dates on these e-mails indicated that a human factor was still being considered more than ten days after the incident with the Complainant never being charged in the sideswipe, D. Jones testified that he did not know. D. Jones testified that it was not unusual for T. Thornton to leave the B Tower to tell the Complainant that an assessment was going to be entered. He testified that it was a matter of courtesy and done so that employees are not surprised by the letter that the collective bargaining agreement requires.

Exhibit 8 to D. Jones' Deposition (RX 61 at 211-212)

This exhibit contains eighteen entries describing incidents in which employees were charged with GR-2 violations within nine sub-divisions of the Jacksonville Division from 1/24/2008 through 8/31/2011, including the incident involving the Complainant. The exhibit indicates that the Complainant's incident was the only incident arising out of the Waycross sub-division and was the only incident with T. Thornton as the Referring Manager. Of the eighteen entries, fifteen were designated as "Charge Major." Of those fifteen majors, nine incidents resulted in the employee being dismissed, one in employee resignation, two in "30 Days AS," one in "5 Days AS," and two in "time served." Of the same fifteen majors, in five incidents the employees were offered waivers. The incidents in which the employees were offered waivers were the incidents that resulted in either 30 Days AS, 5 Days AS, or "time served." Two of the eighteen entries were designated as "ICI" and the resulting discipline was ICI. One entry was designated as "Hold T/O" and the resulting discipline was "Time Out."

The incident involving the Complainant is described as "When notifying employee of FRA incident handling employee's conduct was boisterous and vulgar. He also made threats against the company made threats to shut yard down." Of the five incidents that D. Jones identified as similar to the Complainant's, four resulted in dismissal and one resulted in resignation by the

employee. The first incident D. Jones identified cited use of "boisterous, profane, vulgar language, quarrelsome, and vicious." The second incident stated the employee "became loud and argumentative" and "came within 6 inches of Assistant Terminal Superintendent's face." This incident involved violations of other rules in addition to GR-2 and resulted in the resignation of the employee. The third incident stated the employee acted "in an uncivil and discourteous manner when he became quarrelsome and vicious with hotel employee." The fourth incident stated the employee was "boisterous and used profane language." The fifth incident indicates that the employee "became quarrelsome and boisterous and failed to behave in a civil and courteous manner." This incident involved violations of other rules in addition to GR-2.

Exhibit 9 to D. Jones' Deposition (RX 61 at 213-224, 238)

This exhibit contains the employee histories of the employees involved in the incidents identified by D. Jones as similar to the Complainant's from Exhibit 8, summarized above. The exhibit indicates that the employee involved in the first incident was dismissed but was later reinstated. (RX 61 at 213). The exhibit indicates that the employee involved in the second incident resigned. (RX 61 at 216). The exhibit indicates that the employee involved in the third incident, who is listed as dismissed in Exhibit 8, was reinstated. (RX 61 at 214-215, 238). The exhibit indicates that the employee involved in the fourth incident was dismissed but the appeal resulted in a compromise, which apparently included reinstatement as two additional disciplinary incidents are recorded after the GR-2 violation described in Exhibit 8. (RX 61 at 218-220). The exhibit indicates that the employee involved in the fifth incident was dismissed and his appeal was denied. (RX 61 at 221-223).

Exhibit 10 to D. Jones' Deposition (RX 61 at 225-228)

This exhibit contains the dismissal letters for the employees involved in the first, third, fourth, and fifth incidents from Exhibit 8 identified by D. Jones as being similar to the Complainant's.

Documentary Evidence

6/5/2011 E-Mail; Subj: Switchlist Detail (CX 1)

This exhibit indicates that T. Thornton e-mailed B. Bennett that property damage occurred during an apparent sideswipe incident. A follow-up e-mail indicates that video was reviewed that confirmed a sideswipe occurred when coupling operations on track B46 fouled B48.

6/9/2011 E-Mail; Subj: B46-48 Cornering June 5, 2011 (CX 2)

This exhibit includes three recommendations from an electronics engineer under the heading "US7S Software upgrades." An additional recommendation addresses training for yardmasters.

6/13/2011 E-Mail; Subj: Assessment Form Results (Transportation- Jacksonville) (CX 3, RX 11)

This exhibit includes the Complainant's employee information. It indicates that the referring manager was T. Thornton and describes the event as taking place at 0700 on 6/11/2011. The record indicates that the rule violated was GR-2. The detailed description states that "when notifying employee of FRA incident handling employee's conduct was boisterous and vulgar. He also made threats against the company made threats to shut yard down." No witnesses other than the referring manager are indicated. The incident is marked as a major violation.

6/11/2011 E-Mail; Subj: REF CONV [COMPLAINANT] (CX 4, RX 10)

This exhibit is an e-mail from T. Thornton to herself, with B. Bennett cc'd. The e-mail states that on Saturday, June 11, at 6:45 A.M. T. Thornton had a conversation with the Complainant and advised him that an assessment had been put in against him due to the sideswipe incident. The e-mail indicates that the Complainant

> "immediately made comments that he would shut this yard down- would walk every track- stop pulling cars, would call a lawyer – he said he didn't make any waves about he could have been killed during the incident, that we had just killed someone in the bowl,- we knew we were in the wrong because we put in new procedures to prevent this from happening again- stated he had been to 3 viewings and funerals of close friends this week and was already under stress- very irate- cursing and carrying on."

(CX 4). The e-mail continues noting that at 7:45 A.M. the Complainant contacted T. Thornton to inform her that he was too upset to stay at work. T. Thornton wrote that she asked him if he could wait until she got him a relief, which he told her he would try to do. The e-mail indicates that the Complainant called back at 8:00 A.M, said he was too upset, that he had five crews to keep up, and that he was afraid he might get someone hurt so he had to leave, which he did.

6/15/2011 E-mail; Subj: Jacksonville: File 212122 [Complainant] Chrgltr Major (CX 6, RX 12)

RX 12 shows only the original e-mail from D. Lewis to R. Logan and T. Thornton with the Southern Region Transportation list and Ms. Furmon cc'd. CX 6 shows that this e-mail was forwarded by Ms. Furmon to B. Bennett. The original e-mail from D. Lewis indicates that the attachment contained a draft of the charge letter. The e-mail indicates that D. Lewis recommended that the Complainant instead receive a waiver with "an express caution that any future misstep on his part with respect to inappropriate conduct will result in a charge and, if the misconduct is proven by substantial evidence, dismissal. He would get a slap on the hand now but a very short leash for the future." (CX 6 at 1). The attachment contains a draft of the charge letter summarized below at RX 13.

7/25/2011 E-mail; Subj: 212122 [Complainant] … Transcript Review (CX 7, RX 16)

The e-mail from Mr. Garcia to D. Jones contains a recommendation for a 60-day suspension "however, final determination is at the discretion of the Division Manager." (CX 7 at 1). Mr. Garcia's transcript review is attached to the e-mail. The transcript review contained a review of the procedural sufficiency of the investigation, the Complainant's disciplinary record including a 45-day suspension for speeding for which a waiver was granted in 2010, a summary of the facts surrounding the incident including the testimony at the investigatory hearing, and a

recommendation of suspension. The summary of the incident includes that the Complainant was informed of a possible FRA incident and that he responded "inappropriately by raising his voice, using profanity, and stating that he would 'shut the yard down.'" (CX 7 at 2). The summary of the Complainant's testimony at the investigatory hearing notes that the Complainant admitted he used profanity but that he "disavows that he stated "shutting down the yard." The summary also notes T. Thornton's testimony that she did not feel threatened by the Complainant's behavior and that the Complainant apologized to her for his behavior. "Given [the Complainant's] sincerity and cooperativeness, there should be consideration as to the discipline imposed, but in no event should rise to the level of dismissal." (CX 7 at 3). The exhibit indicates a recommendation of a 60-day suspension.

8/3-5/2011 E-mail string; Subj: 212122 [Complainant] Discltr- Dismissal (CX 8)

The string of e-mails begins with the 8/3/2011 e-mail notifying several people and e-mail lists that the Complainant had been dismissed. The exhibit indicates that Mr. Thurmon sent the original e-mail to T. Thornton with the body of his email stating "No doubt you'll miss this person." The exhibit indicates that T. Thornton responded, "Not really- but I hate to be the one responsible for someone losing their job." The exhibit indicates that Mr. Thurmon responded "He fired himself. You didn't do it."

6/13/2011 E-mail string; Subj: DRAFT: 211962 [Complainant] Chrgltr Major (CX 9, RX 6)

RX 6 shows only the original e-mail whereas CX 9 contains D. Lewis' response. The original e-mail asks for D. Lewis, T. Thornton, B. Bennett, et al., to review a draft of the charge letter relating to the sideswipe incident. D. Lewis replied to B. Bennett and T. Thornton at approximately 5:30 P.M. on June 13, 2011, with revised language she proposed.

6/13/2011 E-mail; Subj: 211962 [Complainant] chg has been cancelled (CX 10)

The e-mail stamped June 13, 2011, at 8:10 P.M., states that B. Bennett directed the deletion of the assessment related to the sideswipe incident.

6/5/11 Jacksonville Division Event Report of Human Factor Property Damage (CX 11)

The exhibit indicates that the Complainant was involved in a sideswipe event on June 5, 2011, at 5:30 A.M. The exhibit indicates that B. Bennett completed the form. The "Description of Event" indicates that before he started the job, the Complainant was notified that the track he was going to be working on had 4-5 car lengths of room on the east end. The description states that when the Complainant completed the coupling and began to swing out of the bowl, he heard dragging equipment, stopped the cut, dismounted, and found that the hand brake was on the ground. The description states the Complainant notified the B-Tower Yardmaster that the car needed to be bad ordered, and that he was instructed to leave the car in the track. The estimated damage is noted as $29,000. The exhibit indicates that after the prompt "Assessment Entered" the box next to "Yes" is checked.

6/9/2011 E-mail; Subj.: For Friday's Call (CX 12)

The e-mail dated June 9, 2011, at 9:37 A.M., contains a chart depicting FRA reportable Train Accidents. This chart includes an entry for an incident at Waycross, Georgia, in the Jacksonville Division. The Cause is listed as "Human Factor." The Description is listed as "While coupling track B46 at Waycross rice yard, Y392-04 knocked the bottom car in the track out, side swiping 4 other cars. H301 Car(s) shoved out and left out of clear."

6/10-15/2011 E-mail string; Subj.: R90200 Waycross, GA (CX 13, RX 7, RX 8)

The string of e-mails begins with a request to B. Bennett to complete the human factor section in an unidentified incident report on June 10, 2011. A June 13, 2011, e-mail to B. Bennett from Ms. Johnson asks again to complete the human factor section and requests additional information related to the incident. On June 15, 2011, B. Bennett responded to Ms. Johnson directing her to change the cause of the sideswipe incident from H301 to S016. On June 15, 2011, Mr. Cahill responded to B. Bennett asking about the reason for the change. D. Bennett responded approximately 20 minutes later with a four-point list. His reasons for changing the cause code were because an alarm for a critical alert was not working, the car count and distance was not set up correctly leaving just 12 feet of room from the clearance point, the standard track full measurements at the time of the incident were not set up correctly, and the system was not set up with blow back protection when a particular track is blocked out.

RX 8 is a string of e-mails beginning with the same request to B. Bennett about completing the human factor section of an incident report. The string of e-mails in RX 8 diverges when Mr. Cahill responded to B. Bennett's request to change the cause code by addressing the "Rice Yard T.A.P.S. members" and requesting fact-based statements regarding why the cause code was changed. RX 8 indicates that B. Bennett responded to this general request with the same four-point list he provided to Mr. Cahill summarized above.

6/16/2011 E-mail; Subj.: Side swipe s016 Key points (CX 14)

The e-mail indicates that B. Bennett sent an attachment to two other people at approximately 1:30 P.M. on June 16, 2011. The attachment is a one-page document with the heading "FRA Reportable side swipe B46/B48 S016 key points." The document contains the same four-point list as the e-mail summarized above at CX 13 and RX 7 and indicates that the "track full" and "track near full" definitions to be increased.

8/3/2011 Dismissal Letter (CX 15, RX 19)

The letter references the formal investigation conducted on July 6, 2011. The letter states that "As a result of the testimony and other evidence presented in the investigation, it has been determined that you are indeed guilty of violating [Respondent] Operating Rule GR-2. For your violation of this rule and due to the serious nature of this infraction, you are dismissed from the service of [Respondent] effective immediately."

Employee History of Mr. Middleton (CX 16)

The exhibit contains the disciplinary history of Mr. Middleton. The exhibit indicates that T. Thornton was the referring manager for an incident that occurred on November 14, 2011, which is described as "Remote control foreman using profane language over radio- suggest IRC." The exhibit indicates that this result of this incident was ICI. The exhibit indicates that T. Thornton was the referring manager for an incident that occurred on March 30, 2009, which is described as "Shoving cars into outside track at MRCX, shoved 2 cars off end of track derailing 3 sets of trucks." The exhibit indicates that the "Doc. Type" was "Charge SR2,"[9] that the result was 15 days actually served, and that there was a waiver. The exhibit indicates that there was another derailment incident in 2003, which was described as Mr. Middleton "failed to ensure his locomotive was in the clear in track B44 as well as failed to ensure his switchmen protected the head-end movement as prescribed by local bulletin." The exhibit indicates that the "Doc. Type" was "T/O Offered" and that the result was "exonerated."

6/17/2011 Charge Letter (CX 17, RX 13)

The letter directs the Complainant to attend a formal investigation on June 23, 2011. The letter states the purpose of the investigation was to ascertain the facts and determine the Complainant's responsibility, "if any, in connection with information received that on June 11, 2011, at approximately 0700 hours, when notified of a possible FRA incident in which you were involved and for which you might be charged, you responded inappropriately by raising your voice, using profanity, and stating that you would 'shut the yard down.'" The letter states in bold that "A waiver will not be considered in connection with these charges."

6/6-7/2011 E-mail string; Subj.: General Bulletin/ Notice (CX 18)

The e-mail string begins with the notice to "T&E Crews and all concerned" at the Waycross-Rice Yard dated June 6, 2011. The subject of the notice is listed at "Bowl Operations." The bulletin contains the following instructions:

> "Before coupling tracks in the bowl, The conductor must receive the amount of room on the east end of the track being coupled from the A Tower yardmaster. If less than 5 car lengths of room are available, all [a]ffected tracks must be blocked by the A[] tower yardmaster or the conductor/ qualified employee must be on the rear of the track to provide point protection."

The exhibit indicates that B. Bennett forwarded this notice to "Jax Div Waycross Transportation" and directed the Trainmasters to "make sure everyone understands and complies until we can add automatic protection to our hump system."

6/14/2012 E-mail; Subj.: Award Nos. 48, 49, 51, 53, 54 & 55 of PLB 7145 (CX 19)

The e-mail, sent by Mr. Garcia to "Arbitration Awards South" states that it contains "a summary of the captioned Awards for your use in distributing the decisions to your respective Managers and when corresponding with field customers." Award No. 53 is identified as involving the Complainant. The entry states "Denied the appeal of dismissal assessed Appellant for conduct

[9] Read in conjunction with the Respondent's progressive discipline policy, this notation appears to mean

unbecoming in violation of … Operating Rule GR-2. The cost savings will be approximately $70,200."

Line Diagram (CX 20, RX 29)

The exhibit depicts graphically how the sideswipe incident occurred.

Complainant's Written Statement June 6, 2011 (CX 21, RX 31)

The exhibit is hand-written and describes the sideswipe incident. The Complainant wrote that he was working in the bowl on first shift starting on the evening of June 4, 2011. He wrote that the yardmaster in A-Tower told him that the track was full before he started to couple track B46. "I took extra care to couple track easy knowing that the track was full." The Complainant wrote that the last couple was four or five cars from the bottom. He wrote that as he was riding on the north side of the car while swinging he heard a dragging sound and that he then stopped, dismounted, and walked around to the other side where he noticed a hand brake on the ground and the car was damaged. The Complainant wrote that he reported the damage to the B-Tower yardmaster and was instructed to leave the car in the track, which he did. The Complainant wrote that he finished his shift. The Complainant wrote that "at no time did I know that the car was hit or damaged while I was working…I didn't see or hear anything that would have let me know that the car had been hit." (CX 21 at 2). The Complainant wrote that had he known, he would have stopped working and reported it to a supervisor immediately.

6/6/2011 Transportation Bulletin (CX 22, RX 32)

The exhibit's heading is "Action Plan Bulletin Issued." The exhibit indicates the bulletin was addressed to "T&E Crews and All Concerned." The subject of the bulletin is "bowl operations" and it is noted to be effective immediately. The exhibit indicates that special instructions were thereby amended to require that before coupling in the bowl, a conductor must receive the amount of room in the east end of the track from the A Tower yardmaster. The bulletin states that if less than five car lengths remain, all affected tracks must be blocked by the A Tower yardmaster or the conductor must be on the rear of the track to provide point protection.

Jacksonville Division Report: FRA Reportable Sideswipe Track B46 and B48 (CX 23, RX

The exhibit indicates the Respondent undertook an investigation into the sideswipe incident. The report includes the investigators' findings including the engine downloads, sketches of the incident, photos of the damage, and the resulting action plan. The action plan is comprised of seven items including - changes to the track full or near full distances, a bulletin for coupling instructions, and several proposed enhancements the engineering team was to review. A few of the items indicate that they have already been completed.

Complainant's OSHA Complaint (CX 24, RX 3)

The complaint letter is dated December 6, 2011. The letter states the Complainant's 6.5 year employment history with the Respondent, and describes the operating environment of the

Waycross Yard. The letter describes the railroad as a "rough and ready workplace. The use of profanities such as 'bullshit' is common in Yards such as Waycross, but the Railroad does not fire employees for using such terms." (CX 24 at 1). The letter cites as an example an incident in which T. Thornton used profanity when speaking with T. Riggins, for which she apologized but was not disciplined in any way.

The letter states that there "is a known safety hazard" in the Waycross Yard that has resulted in several incidents in which freight cars have come out of the bowl toward the hump and hit other cars or run through switches. (CX 24 at 1). The letter states that the Respondent did not change any procedures prior to June 6 to address this hazard. The letter describes several measures that might be undertaken to address the hazard such as additional retarders at the hump end of the bowl or yellow cross ties indicating the end of the tracks.

The letter summarizes the sideswipe incident and the follow-on investigation by the Respondent. The letter recounted the Complainant's conversation with T. Thornton in which she informed him that he was being charged with a rule violation for the sideswipe incident.

> "I was upset because if the Railroad was placing the blame on employees like me for such an incident, it was not addressing the underlying problem and eliminating the hazardous situation, and thus it would continue exposing me and my co-workers to dangerous freight car collisions. I explained to Trainmaster Thornton that if the Railroad was going to blame the switching conductor, then every employee who worked my job in the bowl would have to change the way we were working by walking back from the end of the track on which we were coupling to the other end in order to make sure there was room on that track. As a result we would not be pulling cars and making production and we might as well shut the Yard down. I was making the point that if the Railroad was going to blame the employees (instead of eliminating the underlying hazard) then in response the employees would have to shut the Yard down by changing the way they worked. I told Trainmaster Thornton that I would not accept responsibility and if necessary I would call a lawyer to find out my rights to a FRA investigation into this situation."

(CX 24 at 1). The letter states that he did not raise his voice or threaten T. Thornton, though he admitted describing the charge as "bullshit," for which he immediately apologized.

The letter described the charges brought against the Complainant, the formal investigatory hearing that was held, and the resulting dismissal of the Complainant. The letter states that

> "every day of the week Railroad employees use that term and worse without being charged with a GR-2 violation, much less fired…I was fired not for using the term 'bullshit'…but because I stood up and refused to take responsibility for an incident that resulted from a life-threatening hazardous condition the Railroad knew about but was ignoring. If I had meekly accepted responsibility for that incident and not mentioned I was going to ask for a FRA investigation, I would not have been fired from my Railroad career."

(CX 24 at 2). The letter continues and suggests the incident in which Mr. Middleton used profanity over the radio and yet was not fired, charged with a GR-2 violation, suspended, or taken out of service. The letter cites relevant FRSA sections and alleges the Respondent engaged

in discrimination and retaliation in violation of the Complainant's rights under the FRSA, for which he requested all appropriate remedies.

Individual Development & Personal Accountability Policy for T&E Employees (CX 25, RX 28)

RX 28 indicates that it is a "revised" version of the policy, but no date is attached to the exhibit, whereas CX 25 indicates that it was revised 7/7/08.[10] The relevant portions of the two versions are identical. The exhibit indicates that the Respondent expected employees to be safe, conscientious, and dependable and to comply with company rules. The exhibit described the progressive handling of various disciplinary incidents.

Minor offenses are defined as rule violations that do not result in derailment or damages to equipment and that are not otherwise identified as "serious" or "major" incidents. The policy states that for minor incidents, managers are encouraged to utilize informal corrective instruction, but multiple minor offenses within a certain period are handled with progressively formal procedure and progressively serious discipline.

Serious offenses are defined as including all rule violations resulting in derailment or damages to equipment. The document provides examples of serious offenses including: coordination between crews working in the same and adjacent tracks, radio rules while shoving or backing, mounting and dismounting moving equipment, crossing over or riding the end of a car being shoved, shoving moves over crossings, protecting shoves, securing cars, and speeding. The exhibit indicates that a single serious offense will not be considered to warrant dismissal. "However, suspension and/or retraining may be appropriate depending on the circumstances. Subsequent serious offenses within a three year period will be handled progressively." (RX 28 at 2). The progressive scheme for handling multiple serious offenses includes increased length of suspensions, possibly in conjunction with additional training, and other measures.

Major offenses are defined as those offenses "that warrant removal from service pending a formal hearing and possible dismissal from service for a single occurrence if proven responsible." (RX 28 at 4). The document provides examples of major offenses including: altercation, dishonesty, concealing material information or providing false material information about matters under investigation, theft, insubordination, Rule G, excessive speeding, major accidents, and other "acts of blatant disregard for the rights of employees or the company." (RX 28 at 4). The progression of major offenses is stated as "removal from service- up to dismissal." (RX 28 at 6).

Complainant's Employee History Report 12/15/2011 (RX 1)

The exhibit indicates that the Complainant had five IDPAP incidents since his hire date of 2/21/2005. The exhibit indicates that for three of these incidents, each of which was 9/14/2007 or earlier, the Complainant received ICI. The exhibit indicates that the Complainant was dismissed for absenteeism in 2007, but his dismissal was appealed and he was reinstated without back pay. The exhibit indicates that on 9/9/2010 the Complainant was involved in an incident for which he received 45 days actual suspension. The Assessment was entered for excessive

[10] Mr. Logan testified that the version at RX 28 applied to the Complainant in 2011.

speeding, specifically reaching a top speed of 32 miles per hour in an area with a 10 mile per hour speed restriction. The exhibit indicates a waiver was offered in this matter. The exhibit indicates that on 6/11/2011, the Complainant was involved in an incident for which he was dismissed. The assessment was described as "When notifying employee of FRA incident handling employee's conduct was boisterous and vulgar. He also made threats against the company made threats to shut yard down." (RX 1 at 1).

Complainant's Employee History Report (RX 2)

The exhibit contains the same incidents summarized above as well as other incidents that are marked as "removed from consideration due to Policy 3-year rolling period." The three ICI incidents from RX 1 are also marked as "removed from consideration due to Policy 3-year rolling period." The exhibit contains an entry marked "Deleted – 6/13/2011 – Delete per Brian Bennett 6-13-11." This entry indicates that the Complainant was involved in an incident classified as a major charge. The entry indicates that a notice was mailed on 6/14/2011. The incident is described as "at approximately 1300 the 1st shift hump yardmaster [] was advised by Hump Foreman [] that there was a damaged car in B48 – after investigation we found that [the Complainant] during coupling operations on 3rd shift had bumped the east most car in B48 in the foul and had sideswiped 4 cars going to B46." (RX 2 at 1).

6/10/2011 E-mail; Subj.: Assessment Form Results (RX 4)

This exhibit includes the Complainant's employee information. It indicates that the referring manager was T. Thornton and describes the event as taking place at 0530 on 6/5/2011. The record indicates that the rule violated was 103. The detailed description states that "at approximately 1300 the 1st shift hump yardmaster [] was advised by Hump Foreman [] that there was a damaged car in B48- after investigating we found that [the Complainant] during coupling operations on 3rd shift had bumped the east most car in B48 in the foul and had sideswiped 4 cars going to B46." (RX 4 at 1). The results are described at $29,658 in damages to five cars. The incident is marked as a major violation. The incident is marked as not FRA Reportable or FRA violation.

6/6/2011 E-mail; Subj.: 6-4-11 Side Swipe (RX 5)

This e-mail to B. Bennett contains no text in the body, but has an attachment titled B46 and B48 Side Swipe 6-4-11. The attachment itemizes the damage sustained during the sideswipe incident and indicates that the total cost of the damage was $29,809.

6/17/2011 E-mail; Subj.: Draft – Not sent to Gina Yet (RX 9, RX 30)

This e-mail contains no text in the body, but has an attachment titled Waycross Side Swipe 5JUN2011. The attachment is a report of the investigation into the sideswipe incident. The report contains a summary of the findings. The report indicates that the human factor cause code was assigned on June 5, but changed to the signals cause code on June 15. The report contains diagrams[11] of the track layout, photographs of the damaged cars, a summary of the facts and

[11] The diagrams are re-submitted independently in RX 30.

timeline of the incident, a summary from the signal department and transportation department, the Complainant's written statement, and the action plan, among other exhibits.

Under the heading "Previous Incident/ Injury(s)" the report indicates that on April 29, 2011, an employee fatality occurred while operating a vehicle on an access road in the yard and the vehicle was struck by a cut of cars. The report indicates the incident was attributed to the Waycross Signal Team. The report indicates the mechanical damage from the incident was $29,325.

Conducting Officer's Notice of Findings (RX 15)

The form refers to the investigatory hearing of July 6, 2011, with the Complainant as principal and Mr. Cooper as the conducting officer. The form refers to sections of the hearing that substantiate the conducting officer's findings that the Complainant was guilty of a GR-2 violation.

8/2/2011 E-mail; Subj.: 212122 [Complainant] … Transcript Review (RX 17)

The e-mail from R. Logan to D. Jones, with B. Bennett cc'd, states that "Recommendation of 60 days by [Mr. Garcia]. Biggest points that [T. Thornton] stated she did not feel threatened by [the Complainant's] statement that he would 'shut the yard down' and he apologized to her." (RX 17 at 1). The e-mail has an attachment, summarized above at CX 7, RX 16.

8/3/2011 E-mail; Subj.: 212122 [Complainant] Discipline drop dead date 8-4-11 MAJOR (RX 18)

The e-mail from R. Logan to D. Jones, et al., states only "Dismissal GR-2." This e-mail is a response to an e-mail with only attachments, no message in the body of the e-mail. The attachments are not included in the exhibit.

Denial By Public Law Board No. 7145 (RX 20)

The exhibit dated May 30, 2012, indicates that the Complainant's appeal of his dismissal to the Public Law Board was denied. The exhibit indicates that the Board reviewed the Complainant's appeal procedurally and on the merits and found that substantial evidence of record supported the Respondent's decision.

3/26/2012 Charge Letter (RX 21)

The letter directs the Complainant to attend a formal investigation on April 3, 2012, the purpose of which was to develop the facts and determine the Complainant's responsibility,

> "if any, in connection with information received on March 19, 2012, that on March 14, 2012, at approximately 2200 hours, at or near Waycross, GA., while off property and out-of-service pending final resolution of an appeal challenging your dismissal in August of 2011 for inappropriate and threatening conduct, you verbally threatened and physically assaulted a company officer. A warrant was

> issued for your arrest in connection with the incident, and you have been criminally charged with aggravated assault."

The letter notes that the Complainant was "currently dismissed" for a previous incident, but that an appeal in that matter was still pending. The letter states that if the appeal results in reinstatement, the Complainant would be immediately removed from service pending investigation into the March 2012 River Bar incident for which the charge letter was issued.

9/20/2010 Waiver Letter (RX 22)

The letter indicates that the Complainant requested to "accept responsibility" for an excessive speeding incident and waive his right to a formal investigation into the incident. The letter indicates that as a result of his admitted rule violation, he was assessed forty five days actual suspension.

Employee History T. Riggins (RX 37)

The exhibit indicates that T. Riggins was hired in 2001 and was involved in three IDPAP incidents between 2004 and 2007, each of which had been removed from consideration due to "Policy 3 year rolling period." The exhibit indicates that each of these incidents resulted in ICI. The exhibit also indicates incidents involving absenteeism/availability, each of which is marked as removed.

Respondent Operating Rules; Rule GR-2 (RX 39)

The exhibit indicates that Operating Rule GR-2 requires that all employees behave in a "civil and courteous manner when dealing with customers, fellow employees and the public." (RX 39 at 5). The rule also lists examples of conduct not permitted under this rule including using of "boisterous, profane, or vulgar language," "entering into altercations while on duty or on company property," and being "disloyal, dishonest, insubordinate, immoral, quarrelsome, vicious, careless, or incompetent." (RX 39 at 5). The exhibit indicates that GR-2A prohibits criminal conduct that might damage the company's reputation or "indicates a potential danger to the company, its employees, its customer or the public." (RX 39 at 5).

Respondent Operating Rules; Rule 103 (RX 40)

The exhibit indicates that operating Rule 103 states "when shoving or pushing equipment at any location, a crew member … must take action to prevent damage, protect against conflicting movements, and avoid fouling other tracks. A crew member or other qualified employee must be located at, on, or ahead of the leading end of the movement, except when the employee protecting the movement can make a positive visual determination" of several items including "there is sufficient room in the track to hold the equipment being shoved." (RX 40 at 2). Rule 103-A states that when coupling cars, employees must take precaution to prevent damage or fouling of other tracks and that "when there is a possibility of cars being shoved or of cars rolling the entire length of a track, a trainman must protect the movement, unless otherwise provided." (RX 40 at 2).

The exhibit indicates that Rule 103-G requires that when it is necessary for an employee to enter any track with equipment, adjust a coupling device, or to place himself between rolling equipment, certain protection measures must be taken to prevent cars from being released from the hump into the track involved. These measures include the employee notifying the operator or remotely controlled switches of the work to be done, requesting protection, and not entering the track until being notified that the track is protected. The measures also require the operator of the switch to line each switch against the movement to that track, apply effective blocking to the device controlling the switch, and notify the employee that the protection has been provided.

Respondent's Safe Way Policy (RX 41)

The exhibit lays out five rules, "The 5 Lifesavers," under the heading "Switching Operations Fatality Analysis." The exhibit lays out the Respondent's Safety Policy, which states that the Respondent "is committed to being the safest railroad in the country. By complying with these rules and empowering everyone with the right, the responsibility, and the resources to make safe decisions, we will accomplish our goals." (RX 41 at 3). The exhibit states that because rules cannot be written to cover every situation, employees are "empowered to make decisions and take action necessary to prevent personal injuries. Where no specific rule applies, we must rely on good judgment, following the safest course available." (RX 41 at 3). The exhibit contains an excerpt from the general safety rules that states that "Employees must immediately report to the train dispatcher or supervisor all incidents involving equipment and any other incident involving loss or damage to [Respondent] property." (RX 41 at 4).

Complainant's Employee Assistance Program (EAP) Treatment Notes (RX 48)

The exhibit indicates that the Complainant called the Employee Assistance Program. The notes from the counselors who spoke with the Complainant are generally consistent with his testimony at the hearing.

6/22/2011 Letter From Mr. Sutton to the Complainant (RX 49)

The letter is from Mr. Sutton, a "certified employee assistance professional." The letter indicates that the Complainant called the Employee Assistance Program on June 11, 2011, and briefly summarizes the encounter. The letter briefly summarizes another phone call and Mr. Sutton's arrangement for the Complainant to be seen by a therapist. The letter states that the Complainant reported continuing outpatient counseling related to his situation at work.

Letter From Mr. Ward to Respondent Managers (RX 50)

The letter from the Respondent's President states that it is a reminder that "Right Results, Right Way" applies "in all situations, including when an employee reports an injury or illness. Harassment, intimidation, or retaliation in connection with injury reporting is absolutely prohibited." (RX 50 at 1). The letter notes the FRA's requirement that railroads adopt and comply with a policy "prohibiting harassment or intimidation of any person that is calculated to discourage or prevent that person from receiving proper medical treatment or from reporting an

injury or accident." The letter indicates that the Respondent's policy is attached. The letter notes that violations of this policy will result in appropriate discipline, up to and including termination.

The letter also notes the FRSA's prohibition of "any discipline, discrimination, or other retaliation against an employee for…filing safety or security complaints." (RX 50 at 2). The letter states that violations of the FRSA are also inconsistent with the Respondent's Code of Ethics and can result in appropriate discipline, up to and including termination. The letter also notes the legal ramifications of violations, including monetary damages.

The attachment is dated September of 2007. It states that the Respondent requires its employees to comply with "the letter and spirit" of the FRSA's accident/incident reporting regulations. The attachment notes that violations of this policy include "harassment or intimidation of any person calculated to discourage or prevent that person from receiving proper medical treatment or from reporting such accident, incident, injury or illness" and "retaliation against any person for complaining that this policy has been violated." (RX 50 at 3). The attachment provides instructions for employees who believe "in good faith" that this policy has been violated to make a report to the company's reporting officer or ethics hotline. The attachment notes that employees who make complaints shall have "'whistle blower' protection from any retaliation due to making of the complaint." (RX 50 a 3).

"Whistleblowing: Managing Questions & Concerns" Course Transcript (RX 51)

The exhibit contains a transcript of a training course, which is described as "Covers how managers should handle whistleblowing reports and questions." (RX 51 at 1). The transcript indicates that the course covers handling reports, the manager's leadership role, how reporting helps, and anti-retaliation.

In the "handling reports" section of the training, the transcript states that "employees have several avenues available to report issues including supervisors, Human Resource representatives, and the [] Ethics Information Hotline and website." (RX 51 at 5). The transcript indicates that the hotline is available 24 hours a day, seven days a week, and that callers may remain anonymous if they wish. The transcript notes that retaliation against employees for reporting suspected misconduct or raising a concern in good faith is prohibited.

The transcript describes methods of creating a work environment in which employees are comfortable reporting issues. The transcript addresses retaliation and gives examples of retaliation against employees who make reports such as firing, demoting, or other adverse employment actions; treating an employee as a "troublemaker" or "not a team player;" characterizing reports as "disloyal;" denying benefits, overtime or promotion; and reducing pay or hours. (RX 51 at 15). The transcript addresses the various sources of whistleblower protections under the law.

"Anti-Retaliation for Supervisors" Course Transcript (RX 52)

The exhibit contains a transcript of a training course, which is described as "In this course, supervisors will learn the steps needed to protect employees against retaliation." (RX 52 at 1).

The transcript indicates that the course covers safety complaints, injury reports, discrimination complaints, and financial reporting.

In the introduction, the transcript states that supervisors are responsible to ensure that employees are not "retaliated against or harassed for reporting actual or suspected misconduct in good faith, or for engaging in some other 'protected conduct.'" The transcript states that such retaliation can be a violation of federal and state laws and regulations, and can be a violation of company policy. The transcript defines actions that constitute protected activity and retaliation. The transcript states that the Respondent prohibits retaliation and takes claims of retaliation seriously noting that the appropriate discipline for retaliation is up to and including dismissal.

The transcript states that supervisors should encourage employees to report safety issues they discover without fear of reprisal and that supervisors should make employees aware of the various options for reporting safety concerns. "Employees should be encouraged to discuss concerns during safety meetings, to speak individually to their supervisor, and to report their concerns through the Company's other reporting mechanisms, including the Division Safety Hotlines, or the Ethics Information Hotline." (RX 52 at 3).

Waycross Journal-Herald, 8/17, 19-20, 22-27/2011 (RX 53)

The exhibit contains excerpts from the classified section of the *Waycross Journal-Herald*. The exhibit indicates that on August 17, 19-20, and 22- 27 of 2011, an ad was placed by St. Mary's Railway for a "Switchman/ Conductor." The ad states that railroad experience is preferred, but not required and that applicants must have a valid driver's license. The ad directs applicants to apply in-person at an address in Waresboro.

7/1/2011 Railroad Retirement Board Letter (RX 54)

The letter from the Railroad Retirement Board indicates that the attachment is a list of recent job vacancies that have been reported to the Railroad Retirement Board's field offices. The attachment indicates that an "engineer/conductor" position was available in Albany, Georgia. The attachment indicates that there were also two additional "engineer/conductor" jobs, one "switchman/conductor" job, one "railroad conductor/ engineer" job, two "conductor" jobs, one "conductor trainee" job, and two "assistant passenger conductor" jobs, all of which were located out of the state of Georgia.

6/5/2012 Railroad Retirement Board Letter (RX 55)

The letter from the Railroad Retirement Board indicates that the attachment is a list of recent job vacancies that have been reported to the Railroad Retirement Board's field offices. The attachment indicates that an "engineer/conductor" position and a "conductor" position were both available in Albany, Georgia. The attachment indicates that there was a another "engineer/conductor" job, another two "conductor" jobs, two "conductor trainee" jobs, one

"conductor/brakeman" job, two "locomotive engineer/ conductor" jobs, and one "train conductor/ engineer" job, all of which were located outside the state of Georgia.

DISCUSSION

I. The Complainant has failed to establish by a preponderance of the credible relevant evidence that he engaged in protected activity during his June 11, 2011 conversation with Trainmaster T. Thornton that was a contributing cause to either his June 17, 2011 suspension from employment or August 3, 2011 termination of employment.

The Complainant must make a *prima facie* showing of retaliation by demonstrating by a preponderance of the evidence that: (1) he engaged in protected activity; (2) the employer knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action. *Consolidated Rail Corp. v. United States Dep't of Labor*, 567 Fed. Appx. 334, 337 (6th Cir. 2014); *Murphy v. Norfolk S. Ry. Co.*, 2015 U.S. Dist. LEXIS 25631, *11, 2015 WL 914922 (S.D. Ohio Mar. 3, 2015). At this stage, this presiding Judge may consider both the Complainant's and the Respondent's evidence that is relevant to these four elements of the Complainant's *prima facie* case. *Powers v. Union Pacific Railroad Co.*, ARB No. 13-034, ALJ No. 2010-FRS-00030 (ARB Mar. 20, 2015) (en banc). The Respondent's statutory defense is not relevant to the Complainant's *prima facie* case and is analyzed under a clear and convincing evidence standard only if the Complainant successfully establishes his *prima facie* case by a preponderance of the credible evidence.

A. The Complainant has established by a preponderance of the evidence that he suffered adverse employment actions of suspension on June 17, 2011 and employment termination on August 3, 2011.

Section 20109(b)(1) of the FRSA and 29 C.F.R. § 1982.102(b)(2), specifically prohibit a railroad carrier, or employee of a railroad carrier from suspending an employee for reporting a hazardous safety condition. Under the Act, a suspension constitutes an adverse action by an employer. *DeFranceso v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-00009, slip op. at 5 (ARB Feb. 29, 2012). Discharge is identified in the FRSA as prohibited discrimination. 49 U.S.C. §20109.

The Parties have stipulated that the Complainant's employment was terminated on August 3, 2011.

The evidence also established that in afternoon of June 17, 2011 the Complainant met with Terminal Supervisor B. Bennett in the presence of his local union chairman, T. Riggins. During the June 17, 2011 meeting, B. Bennett informed the Complainant that he was not being charged with a Rule 103 violation involving failure to protect the shove on June 5, 2011 but that he was being charged with a GR-2 rule violation stemming from his June 11, 2011 morning discussions with Trainmaster T. Thornton. The Complainant testified in deposition and at the formal hearing that he was taken out of service at the June 17, 2011 meeting and had no income from work between the June 17, 2011 meeting and while waiting for a decision from the June 23, 2011

investigation, which concluded with his employment termination. CX 17 is a copy of a June 17, 2011 letter which directed the Complainant to attend a formal investigation on June 23, 2011 into the June 11, 2011 event and that "a waiver will not be considered in connection with these charges."

After deliberation on the credible evidence of record this presiding Judge finds the Complainant suffered adverse employment actions on June 17, 2011 by being suspended from work and on August 3, 2011 by having his employment terminated.

B. The Complainant has established by a preponderance of the evidence that he engaged in protected activity on June 11, 2011 under 49 U.S.C. §20109(b)(1)(A) by reporting a hazardous safety condition that the Waycross yard had not put in place sufficient measures to prevent sideswipe incidents from happening and that the results could reasonably lead to employee injury or death.

Protected activity may include providing information regarding conduct that 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 knowingly false reports of safety violations. *See Walker v. Amer. Airlines*, ARB No. 05-028 AIR (Mar. 30, 2007) (unpub.). A *good faith* report requires both objective and subjective belief that the complaint relates to safety concerns. *See Hernandez v. Metro-North Commuter Railroad*, No. 1:13-cv-02077 (S.D.N.Y. Jan. 9, 2015) (2015 WL 110793; 2015 U.S. Dist. LEXIS 2457) (in which the court found that the Act requires a reasonable belief by the complainant both that the reported conduct was related to railroad safety or security and that an objectively reasonable person in the same factual circumstances as the complainant could believe the same.); *Jackson v. Union Pacific R.R. Co.*, ARB Case No. 13-042; ALJ Case No. 2012-FRS-00017 (Mar. 20, 2015)(in which the Board found that substantial evidence supported the ALJ's finding of protected activity when the record contained support for both the complainant's subjective good faith and other employees' reasonable belief that a complaint such as the complainant's constituted a safety concern.). A good faith belief of a violation of a federal law, rule, or regulation relating to railroad safety is required by 49 U.S.C. §20109 (a)(2). However, 49 U.S.C. §20109 (b)(1)(A) requires only a good faith report of a hazardous safety or security condition.

The alleged protected activity made prior to the adverse employment actions of suspension on June 17, 2011 and termination on August 3, 2011 arise out of the single verbal exchange made between the Complainant and Trainmaster T. Thornton the morning of June 11, 2011. The Complainant's original written complaint (ALJX 7) was made six months after the Complainant was suspended and four months after his employment was terminated; therefore those additional safety complaints made in that December 6, 2011 correspondence that were not included in his June 11, 2011 statement to Trainmaster T. Thornton[12] are not relevant to the Complainant's allegation of discrimination / retaliation under the FRSA.

[12] The Complainant recommended placing retarders on the west-end of the coupling track to prevent rail cars from rolling out of the hump end of the bowl and indirectly recommended placing yellow cross ties on the west-end of the track to let employees know where the track ends. The Complainant testified that these suggestions were not part of the safety complaints he made to T. Thornton on June 11, 2011.

There is no evidence that the Complainant made safety complaints to B. Bennett during the meetings of June 6, 2011 or June 17, 2011. The Complainant testified that he did not make any safety complaints at either of the June 6th or 17th meetings with B. Bennett; nor in his June 6, 2011 statement written for use by Division Manager D. Jones. He subsequently testified that the only safety complaints he made were in the June 11, 2011 conversation with T. Thornton and in his December 2011 written complaint to OSHA.

The Complainant testified at the formal hearing that he was called out of the break room before his June 11, 2011 shift by T. Thornton who told him that an assessment was entered for his "failure to protect a shove" as a Rule 103 violation arising out of the June 5, 2011 damage to railcars. His response that arguably relates to safety included – "I can't stand at the couple and tell what's going on at the end of a track … there's something wrong here, I could have been coupled, I could have been killed … if we have to walk back in to see how much room we've got on the other end and you can't make it safe for us to get in this track and couple it, how are we going to be able to work? How are we going to be productive? How are you going to be able to move cars if we got to walk constantly from one end of the track to another? … There's no way we're going to be moving any cars. You might as well shut the yard down … if this is the way it's got to be and you're going to find us at fault every time they put too many cars in the track or we run out the other end, then we're going to have to change the way we're working ... we're going to have to protect ourselves from being killed or hurt." He essentially testified that he was not going to accept the Rule 103 assessment, "if I have to talk to a railroad attorney and file a report with the FRA, whatever I got to do, I'm just not going to accept it I don't think it's right to charge us for the incident taking place." He subsequently testified that his safety complaints were (1) he could have been coupled or killed, (2) cars come out of the hump end of the bowl, (3) "it happened prior to it happening to him" in reference to either the recent death of another employee or prior incidents of rail cars being sideswiped, (4) it was impossible for them to be in two places at once to watch the coupling and to watch the room at the end of the track, and (5) "notify the FRA and get a railroad attorney if I had to file for an investigation into the matter so they could find out exactly what the proper fix was or what to do about it."[13]

The Complainant testified that during the June 11, 2011 conversation with T. Thornton he was trying to convey that he didn't want to get hurt while having to walk from the spot where he was coupling cars to the moving end of the cars to ensure there was room in the track so cars at the hump end of the track would not a run out every time he did car couplings. During his deposition, the Complainant testified essentially that the safety problem that allowed the sideswipe incident to occur had not been fixed, the railroad should not blame him for that problem, and he would go to an attorney or the FRA to have an investigation done to determine how to fix the problem. He testified that the safety issue he tried to convey to T. Thornton was that if a person is between cars moving draw-heads for coupling, a car coming down off the hump could "squish" a person between cars.

[13] Immediately after the June 11, 2011 conversation with T. Thornton the Complainant determined he could not concentrate on his job and asked permission to go home. A replacement for his shift was found and the Complainant was permitted to leave. He was originally in a "sick leave" status which was subsequently reclassified as "refused to work." The Claimant testified in deposition that he was not disciplined in any way for not working on June 11, 2011. Additionally, there was no timely allegation that he was retaliated against under the FRSA for taking himself out of work on June 11, 2011.

T. Thornton testified in deposition that the June 5, 2011 sideswipe incident was a safety concern and that an investigation was immediately initiated and specific remedial actions requirements for the yardmasters were in place the following day. She considered the sideswipe incident to be a safety concern because any sideswipe "could make cars derail, it could cause injuries." She stated there were procedures in place to prevent a person from being crushed during normal operations if the procedures were being followed; but she was not sure if that could happen if the track was fouled. She testified recalling the Complainant stating he could have been killed in the sideswipe incident and could make it a big deal because he could have been hurt in the sideswipe incident. She stated she considered the Complainant's reference to the employee death in April 2011 a safety issue because the new procedures put in place after the death did not address the procedure related to the car lengths left in a crowded track. T. Thornton testified that she sent herself an e-mail of the June 11, 2011 conversation with the Complainant to record the events. This e-mail attributes to the Complainant the words "he didn't want to make waves about he could have been killed during the incident, that we had just killed someone in the bowl, we knew we were in the wrong when we put in new procedures to prevent this from happening again."

Terminal supervisor B. Bennett testified that neither the Complainant nor T. Thornton reported to him any safety related complaints or indications of making reports to the FRA from the Complainant. He testified that T. Thornton's June 11, 2011 e-mail reporting her morning conversation with the Complainant did not raise any safety concerns.

The Complainant's argument that he made a report about a hazardous safety condition, namely cars coming out of the bowl towards the hump, is consistent with T. Thornton's contemporaneous summary noting that the Complainant stated "he said he didn't make any waves about he could have been killed during the incident…we knew we were in the wrong because we put in new procedures to prevent this [referring to the sideswipe incident for which he was being assessed] from happening again." (RX 10). Moreover, the Complainant's hearing testimony to this effect (TR at 98-100) is materially and factually consistent with his deposition testimony (RX 57 at 118-121) and his statements in the internal investigation hearing (CX 5 at 28). While the Complainant never explicitly states in his testimony that he "made a report of hazardous safety condition regarding cars coming out of the bowl toward the hump," his testimony recounting his conversation with T. Thornton consistently refers to the sideswipe incident, which the record establishes involved cars leaving the bowl toward the hump, and to the feasibility of performing coupling maneuvers while complying with Rule 103, which the record establishes is designed to decrease the possibility of sideswipe incidents such as the one in which the Complainant was involved.[14] T. Thornton's testimony also corroborates the relevant portions of the Complainant's assertion that he made a report of a hazardous safety condition. For example, T. Thornton testified in her deposition that she recalled the Complainant told her that while coupling at one end he could not see if the other end of the train was protected and that he could have been killed in the sideswipe incident. (RX 59 at 74).

[14] Such as the reference to "the same kind of situation [referring to the sideswipe incident] as me." (CX 5 at 28). Also, "I can't stand here at the couple and tell what's going to happen all the way at the end of the track… I could have been killed in this" (TR at 99), or "I could have been killed in this incident…If I'm supposed to protect those cars on the opposite end from coming out of the bowl, I can't do that and couple and be in two places the one time." (RX 57 at 119).

The evidence of record also indicates that a reasonable person with like training and in like circumstances would believe that a complaint about cars coming out of the bowl toward the hump was a safety concern. The Complainant explained how a person conducting coupling operations could be "coupled" or "squished" between cars if a sideswipe occurred while working between cars. Additionally, J. Dixon (RX 56 at 100), R. Logan[15] (TR at 426), and D. Jones testified that sideswipe incidents are safety concerns. (RX 61 at 75).

Finally, Respondent began an FRA investigation on June 5, 2011 following the sideswipe incident because of the damage done to four rail cars. The investigation was originally attributed to "human error" caused by a Rule 103 violation for failure to protect the shove. The investigation immediately revealed that there was insufficient track space in the bowl at the time of the June 5, 2011 sideswipe incident to minimize the railcars being coupled from running out of the track and into the lead line, notwithstanding procedural changes addressed from the April 2011 sideswipe incident that resulted in a death. This was addressed by tasking the Tower A yardmaster with informing the conductor of remaining track space in such crowded events and was in place the morning of June 11, 2011. The investigation also revealed that a track alarm which would have alerted employees of the run out of rail cars onto the lead track had been turned off by an unidentified person. These factors also support the reasonableness of the Claimant's statement that the Respondent has failed to address a safety concern involving sideswipe incidents and related employee injury or death that could occur during such incidents.

After deliberation on the credible evidence of record, this presiding Judge finds that the Complainant engaged in protected activity on June 11, 2011 under 49 U.S.C. §20109 (b)(1)(A) when he conveyed to Trainmaster T. Thornton the hazardous condition that the Waycross yard had not put in place sufficient measures to prevent sideswipe incidents from happening and that the results could reasonably lead to employee injury or death.

C. The Complainant has failed to establish by a preponderance of the evidence that his protected activity contributed to his June 17, 2011 suspension.

Complainant's counsel argues that Complainant's June 11, 2011 statement to Trainmaster T. Thornton which included protected activity and the Respondent's basis for the adverse employment actions based on the remaining content and conduct of the June 11, 2011 interaction are inextricably intertwined because it is "impossible to explain why [the Complainant] was charged, suspended and terminated without also discussing his protected activity in making a safety report to [T.] Thornton." (CB at 32).

The Administrative Review Board (ARB) has struggled addressing similar incidents where the Complainant utters few words inclusive of a concern over safety and/or hazardous conditions while engaged in an expansive act of insubordinate conduct and profanity in the course of his discourse. The ARB has consistently found that such expression in a compressed time must be so intertwined that the words amounting to protected activity are considered a contributing factor in establishing the Complainant's prima facie case and the Respondent must then establish by clear and convincing evidence that it would have taken the same adverse employment action

[15] While Mr. Logan testified that he believed a sideswipe incident was a safety issue, he also testified that he did not believe T. Thornton's e-mail contained a safety complaint.

even with the intertwined "expressive" words. See *Powers v. Union Pacific Railroad Co*., supra at *19 ("A more difficult case is where the adverse action is closely intertwined with the protected activity, where evidence is advanced by the complainant to support the contributing factor element of his or her claim may prove more persuasive against rebuttal evidence advanced by respondent to disprove contribution."); see also *Stone & Webster Construction v. U.S. Dept. of Labor*, 684 F.3d 1127 (11th Cir. Jun. 19, 2012) remanding to ARB; *Speegle v Stone Webster Construction, Inc*., ARB Case No. 11-029-A, ALJ Case No. 2005-ERA-00006 (ARB Jan. 31, 2013) on remand from 11th Cir; ARB Case No. 13-074 (ARB Apr.25, 2014) again remanding ALJ "Decision and Order on Remand"; ARB Case No. 14-079 (ARB Dec. 15, 2014) affirming ALJ finding Respondent established adverse action appropriate by clear and convincing evidence.

However, in *Powers* the ARB restated that the Complainant still has the burden to establish that the evidence supporting the contributing factor element of the case is not outweighed by the evidence disproving contribution, even where words and actions are intertwined, while not considering Respondent's reasoning for the adverse employment action. This requires weighing the credibility of the witnesses and weight of the evidence relevant to the "contributing factor" element of the Complainant's prima facie case.

Here the credible evidence of record established that a mishap occurred in the Bowl section of the Waycross rail yard in April 2011 when a switchman was struck by a railcar and died. There is no contradiction to the inference that some corrective procedures were enacted to prevent a reoccurrence of that type of event.

The credible evidence of record also established that on June 5, 2011, the Respondent's management became aware that a sideswipe incident had occurred in the Waycross, Georgia railroad yard when an employee reported to Trainmaster T. Thornton four rail cars had been damaged the night of June 5, 2011 and that T. Thornton notified Terminal Supervisor B. Bennett at that time. It was soon determined that the damaged incurred by the four rail cars exceeded the reportable amount and an FRA investigation immediately ensued.

The TAPS Board conducted the investigation and determined from locomotive downloads from June 5, 2011 operations demonstrated that the Complainant operated his locomotive appropriately. The Complainant met with B. Bennett on June 6, 2011 and provided a written statement of the events on his night shift commencing June 5, 2011 which resulted in damage to an auto carrier rail car he was coupling that night and was directed to leave in the bowl when he completed his shift. He made no statements regarding safety or hazardous issues at that time. The credible evidence of record also established that at the time of the June 5, 2011 damage to the auto carrier, the Complainant was required by established and known procedure to station himself at the head of the direction the rail cars were moving in order to ensure safe operation and prevent damage by collision or derailment. At the time the auto carrier car was damaged, the Complainant was using the remote controlled locomotive to shove the cars toward the hump section of the bowl in order to couple rail cars.

While conducting the FRA investigation, the TAPS Board also looked at signal switch settings and interviewed other employees working the night of June 5, 2011. On June 6, 2011,

immediate procedures were enacted to prevent another sideswipe incident from happening, this included blocking out lead track that might be affected by a rail car being knocked out of the bowl over the hump and into the lead track, even though the procedure could slow down productivity.

The TAPS Board initially considered the strong possibility that human error was involved in the sideswipe incident and damage to the four rail cars. This initial impression was based in part on the Complainant having been told that his track was full, which would require him to walk to the end of his track to ensure the rail cars would not be knocked into the lead track during coupling operations. This initial impression, together with the timeline requirements of the collective bargaining agreement with the union, led B. Bennett to direct, on June 11, 2011, that the Complainant be assessed with a Rule 103 violation for "failure to protect the shove" on June 5, 2011, even though he was not certain whether the Complainant had actually violated Rule 103. He directed T. Thornton to notify the Complainant that he would be assessed a Rule 103 violation.

T. Thornton addressed the issue with the Complainant before his shift began on the morning of June 11, 2011. T. Thornton testified that she did not consider the June 11, 2011 conversation as expressing safety complaints by the Complainant. In this case, the conversation between T. Thornton and the Complainant is the sole basis for the current complaint.

The TAPS Board finally determined that the sideswipe incident could be attributed to a combination of issues, including - then current track parameters did not allow sufficient reserve space for coupling a full track since 3 car racks of 90 foot lengths were placed in the track and that reduced the reserve space on Complainant's track to 12 feet vice the recommended minimum 225 feet, an audible switch alarm indicating a fouled track had been turned off, and the procedures for a blocked track did not provide for "blow-back" protection for the cars involved in the sideswipe incident.

While a member of the TAP Board, B. Bennett testified that on June 13, 2011, he made the decision not to charge the Complainant with a Rule 103 violation because he could not determine where the Complainant was actually located at the time of the sideswipe incident. He also testified that the FRA investigation indicated that the Complainant did nothing wrong during his shift that caused the sideswipe incident. The TAPS Board changed the sideswipe causation code from human error "H301" to a signals error "S016" on June 15, 2011.

The Complainant's allegations that the Respondent needed procedures to protect from death and injury additional to those enacted following the April 2011 employee death and that he would get a FRA investigation going or a railroad attorney involved to improve safety on June 11, 2011 are not credible as such. The Complainant was aware on June 6, 2011 that an investigation was going on when he made his written statement of events to B. Bennett. Additionally, he was aware before he met with T. Thornton on June 11 that some additional safety procedures had been implemented to endure future sideswipe incidents would not occur. The credible evidence demonstrates that the Complainant never mentioned retarders or yellow cross markers at the hump end of the Bowl as additional safety measures until four months after being terminated from employment.

Upon deliberation of the credible relevant evidence of record for the limited period from the Complainant's night shift of June 5, 2011 through his morning discourse with T. Thornton on June 11, 2011, this presiding Judge finds that the Complainant's insubordinate conduct and profanity directed to T. Thornton was precipitated by his perception that Respondent would be holding him accountable for the railcar damages by failing to do his work properly and keeping the moving end of the shove in sight. The Complainant's discourse was grounded solely in his self-serving defense and effort to deflect a perceived disciplinary action. His discourse amounted to a spontaneous rant which was separate from any bone fide concern of safety in the rail yard.

On June 17, 2011 the Complainant met with B. Bennett in the presence of local union representative, T. Riggins. At that time B. Bennett informed the Complainant that he was not being charged with a Rule 103 violation for "failure to protect the shove" on June 5, 2011; but was being charged with a major offense under Rule GR-2 for the way he handled himself with Trainmaster T. Thornton the morning of June 11, 2011. The Claimant's testimony concerning the June 17, 2011 meeting also was limited to addressing the manner he addressed T. Thornton on June 11, 2011 and failure to return B. Bennett's telephone call on June 11, 2011. Local union representative T. Riggins was present at the meeting on behalf of the Complainant and testified that the participants were calm during the 20 minute meeting and that the Complainant was informed that he would not be charged with a Rule 103 violation but would be charged with a GR-2 violation; but that he did not recall B. Bennett mentioning Complainant's conversation with T. Thornton at all. He testified that the Complainant told him about the conversation with T. Thornton after the meeting with B. Bennett. He also testified that a GR-2 violation was more serious that a Rule 103 violation and could result in employment termination.

B. Bennett testified that T. Thornton did not report to him any safety concerns expressed by the Complainant and that he did not consider that the June 11, 2011 e-mail T. Thornton sent herself and provided B. Bennett contained safety concerns raise by the Complainant. He testified that the decision to charge the Complainant with a GR-2 violation was made by Division Manager D. Jones.

D. Jones testified that he did not speak with the Complainant during the June 2011 FRA investigation; that the Complainant never raised any safety concerns or issues with him in connection with the sideswipe incident, and that at no point during the investigation of the sideswipe incident did he become aware of any safety concerns or issues that the Complainant had raised with anyone. He testified that he learned of the June 11, 2011 interaction between the Complainant and T. Thornton from B. Bennett who advised him of "the profanity and everything else used." D. Jones testified he subsequently discussed the matter with T. Thornton. He described T. Thornton appeared fearful and concerned about the Complainant going off on her and that he "thought it would be best if [the Complainant] be removed from service because it was a volatile situation … I was afraid that he would put himself in danger, or others. So I thought a cooling-off period would be appropriate."

The Complainant argues that temporal proximity between the June 11, 2011 protected activity and the adverse June 17, 2011 suspension indicates the June 11, 2011 protected activity was a

contributing factor. While an inference based on the temporal proximity of protected activity to adverse employment action is decisive at the prima facie level of proving a case in a Motion for Summary Decision, it is not dispositive at the merit stage of a proceeding where the Complainant must establish each element of his case by a preponderance of the evidence and there is compelling evidence to the contrary. *Spelson v. united Express Systems*, ARB Case No. 09-063 at FN 3, ALJ Case No. 2008-STA-00039 (ARB Feb.23, 2011) and cases cited therein. Here the decision maker who directed GR-2 charge and suspension of the Complainant pending the union CBA hearing and appeal process, D. Jones, testified he "thought it would be best if [the Complainant] be removed from service because it was a volatile situation … I was afraid that he would put himself in danger, or others" was well documented and supported by his interaction with T. Thornton which led to his conclusion that she appeared fearful of the Complainant. He was also aware of the Complainant's statement involving closing down the yard and/or purposely interfering with the productivity of other employees. Upon deliberation of the credible relevant evidence from June 5, 2011 through the actual notice of the suspension on June 17, 2011, this presiding Judge finds that compelling evidence outweighs any inference of retaliation based on a five day temporal proximity.

The Complainant additionally argues that R. Logan's and D. Jones' testimony that employees who act inappropriately while making safety complaints could be disciplined or "dealt with" also indicates that the Complainant's protected activity was a contributing factor in the adverse action. However, the Courts have held that protected activity will not shield an under-performing or insubordinate worker from discipline. *See, e.g., Formella v. U.S. Sec'y of Labor*, 628 F.3d 381, 391-93 (7th Cir. 2010); *Kahn v. U.S. Sec'y of Labor*, 64 F.3d 271, 279 (7th Cir. 1995) ("We have consistently held that an employee's insubordination toward supervisors and coworkers, even when engaged in a protected activity, is justification for termination."). As a general matter, the whistleblower statutes the Department enforces "render[] whistleblowers no less accountable than others for their infractions." *Daniel v. Timco Aviation Svcs., Inc.*, ALJ No. 2002-AIR-026, slip op. at 25 (June 11, 2003). "It ensures only that they are held to no greater accountability and disciplined evenhandedly." *Id*. This presiding Judge finds that this argument by Complainant's counsel is not entitled to any weight under the facts of this case from June 5, 2011 through the point of actual notice of the suspension on June 17, 2011.

The Complainant also argues that the charge letter at RX 13 indicates his protected activity was a contributing factor in the Respondent's decision to discipline him. However, RX 13 clearly states when the Complainant was advised the morning of June 11, 2011 that he was involved in a possible FRA incident for which he might be charged, he "responded inappropriately by raising your voice, using profanity, and stating you would 'shut the yard down'." As found above, the manner of discourse the Complainant had with T. Thornton on June 11, 2011 was not so intertwined with protected activity such that RX 13 indicated protected activity was a contributing factor for the GR-2 violation and notification of a formal investigation into the GR 2 violation on June 23, 2011.

After deliberation on the credible evidence of record relevant to the issue of protected speech being a contributing factor to the actions taken with regard to the GR-2 violation, this presiding Judge finds that the Complainant has failed to establish by a preponderance of the evidence that

his June 11, 2011 protected speech constituted any contributing factor to his suspension on June 17, 2011 that followed his being charged with a GR-2 rule violation.

D. The Complainant has failed to establish by a preponderance of the evidence that his protected activity contributed to his August 3, 2011 termination of employment.

D. Jones testified that a GR-2 violation covers "conduct unbecoming an employee" and is considered a major offense under the Respondent's progressive disciplinary procedure and as a major offense discipline up to dismissal from employment. He testified that a waiver involving major offenses is a very unlikely event. Local union chairman T. Riggins also reported that the GR-2 violation is more serious than the R103 "failure to protect the shove" violation and that the GR-2 violation could result in employment termination since it was a major offense.

The evidence of record established that the union collective bargaining agreement required certain stepped procedures be taken for investigations into GR-2 violations. Upon a charge of violating GR-2, the employee is to be informed of a formal investigation date, time and location; that the employee has the right to attend the formal investigation at employer's expense, may have a representative assist him, and may present witnesses who have knowledge of the mater being investigated. The report of investigation and recommendations of the investigator are reviewed by a member of management, as well as Respondent's legal/human resources department, before discipline is imposed in a manner consistent with the collective bargaining agreement. Here the Complainant appeared at the formal investigation before Tampa, Florida Trainmaster B. Cooper, was represented for the formal investigation by local union official T. Riggins and Trainmaster T. Thornton appeared as a witness.

T. Thornton testified to the June 11, 2011 discourse by the Complainant in a manner consistent with her testimony in this case, including description of the profanity used by the Complainant and his threat to "shut the yard down, though she did additionally state that she did not feel threatened by the Complainant at the time of the June 11, 2011 discourse. She submitted a copy of her June 11, 2011 e-mail to herself concerning the event. This e-mail included her summary of the Complainant's comments as "He immediately made comments that he would shut this yard down, would walk every track – stop pulling cars or call a lawyer. He said he didn't make any waves about how he could have been killed during the incident – that we just killed someone in the Bowl. We knew we were wrong because we put in new procedures to prevent this from happening again." Her e-mail included a summary of the two subsequent telephones calls from the Complainant that morning in which the Complainant "said he was too upset to stay at work … [and] he was too upset – had five crews to keep [up] and he was afraid he might get someone hurt and he had to leave." Upon examination by the Complainant's representative, T. Thornton described the Complainant during the June 11, 2011 discourse as "He was loud, he was cussing and he was physically or visibly upset" when told that an assessment had been put in on him for the June 5, 2011 sideswipe incident. She testified that she gave the Complainant permission to leave work the morning of June 11, 2011after he stated on the telephone "You weren't safe to work, you were afraid you would hurt someone."

The Complainant made statements during the formal investigation by B. Cooper that he essentially told T. Thornton on June 11, 2011 "that because of this assessment [of a Rule 103

violation] that it would directly affect the way that the people would be working in the Bowl – that we would have to change the basic way we're working. We'd have to walk down … and protect the other end and so forth. And that basic productivity would be lost – that it would automatically make employees out there change the way we've been working and be into a situation to where maybe we weren't as productive and because of this, that we'd end up shutting the yard down … [He] would talk to other employees about it and make sure that they worked accordingly too so that we could protect ourselves from being injured or protect ourselves from being written up for this situation, and that as a result of all this there would be a loss of production and that the yard would end up just shutting down because we wouldn't be moving any cars."

During the formal investigation the Complainant testified in detail about the June 11, 2011 discourse with T. Thornton. He testified that T. Thornton told him he was being given an assessment under Rule 103 involving protecting a shove and "We're going to have to , you know, basically write you up concerning the FRA incident that you were involved in this last week" and being charged with the June 5, 2011 night shift incident. He testified he stated to T. Thornton –

> "There is no way they should be able to charge me with this … if they're going to charge us with this and say that it's my fault that those cars came out the other end of the tracks, then I'm going to have to walk down the track, I'm going to have to protect the other end of that shove. I can't be in two places at one time … down there in the Bowl. I can't watch the knuckles, make sure they're lined up, and tell what's going to take place 2700 foot from me. And therefore … by us having to do this, if they're going to charge me with this incident … we're going to have to change the way we're working … I'm going to have to call my friends, let them know I'm worried about somebody getting hurt or getting, you know, involved in the same kind of situation with me … there's no way that we're going to be able to make production like this. There's no way that if we're going to be responsible for having enough room in these tracks … we'd just as well shut the yard down. There's no way we're going to be moving, pulling any cars."

The Complainant made a closing statement at the formal investigation that addressed his actions and events surrounding the GR-2 violation only. The Complainant's representative also made a closing statement addressing the GR-2 violation only.

B. Cooper indicated in his "Conducting Officer's Notice of Findings" (RX 15) that he found the Complainant guilty of violating GR-2. J. Garcia from Respondent's Labor Relations Department reviewed the formal investigation transcript and findings. J. Garcia noted that the Complainant "was going through some personal issues when notified of the assessment," disavowed stating he was going to shut down the yard, apologized for his behavior, and T. Thornton stated she did not feel threatened by the Complainant. He opined that the event did not rise to the level of dismissal and recommended a 60 day suspension to Jacksonville Division Manager D. Jones on July 25, 2011, with a copy of his recommendation to Assistant Division Manager R. Logan. (RX 16) R. Logan notified D. Jones he agreed with the 60-day suspension on August 2, 2011. (RX 17) D. Jones imposed a penalty of dismissal on August 3, 2011 after review of the investigation, violation of Operating Rule GR-2 and the serious nature of the infraction. (RX 19)

After deliberation on the credible evidence of record, this presiding Judge finds that the Complainant did not engage in protected activity under the FRSA at the formal investigation and

that the investigating officer was not aware of any alleged June 11, 2011 protected activity by the Complainant. Accordingly, his findings were "untainted" by any activity by the Complainant protected by the FRSA. There is also no credible evidence of record that J. Garcia was aware of any June 11, 2011 protected activity by the Complainant at the time he reviewed the report of investigation and forwarded his recommendation to R. Logan and D. Jones.

R. Logan testified that he became aware of the sideswipe incident in a conference call with B. Bennett and D. Jones shortly after the event became classified as a FRA reportable incident. This was several days prior to the June 11, 2011 discourse between the Complainant and T. Thornton that is the basis of the underlying FRSA complaint. He testified that he reviewed B. Cooper's report of formal investigation, the transcript and exhibits after they were forwarded to him. He testified that at no time during the FRA investigation of the sideswipe incident or after did he become aware of any safety concerns by the Complainant. He testified that he did not talk to T. Thornton and that he read her e-mail contained in the GR-2 violation investigation record and did not consider anything set forth in the e-mail as a safety complaint by the Complainant. He testified that he learned about the June 11, 2011 discourse between T. Thornton and the Complainant from D. Jones in the content that the Complainant "became very upset, used the words F-ing bullshit directed towards T. Thornton and also threatened to shut down the yard." He subsequently discussed the matter with B. Bennett who told him the same thing as D. Jones. R. Logan testified that no manager had given him any indication that the Complainant had made a safety complaint June 11, 2011.

D.A. Jones testified that he learned of the June 5, 2011 nightshift sideswipe incident from B. Bennett when it occurred and that B. Bennett conducted the FRA investigation. He stated he did not talk to the Complainant about the sideswipe incident nor did he become aware of any safety complaints made by the Complainant. He testified that B. Bennett reported to him the June 11, 2011 incident between the Complainant and T. Thornton that led to the GR-2 violation. He stated that he talked to T. Thornton about the conversation on June 12, 2011 and that she seemed fearful of the June 11, 2011 event and taken aback by it. D. Jones testified that he decided to remove the Complainant from service because of the volatile situation and belief that the Complainant shouldn't be working in his condition at the time. He directed a letter to R. Logan to do a formal investigation on the GR-2 charge against the Complainant. He reviewed the report of formal investigation, read the transcript of the investigation, reviewed J. Garcia's recommendation of 60-day suspension, and reviewed R. Logan's recommendation of termination. He explained that the seriousness of the offense affecting the entire workforce if left unchecked and the possibility of reinstatement later on led him to decide that dismissal from employment was the appropriate course of action. He testified that a reportable FRA incident is a safety issue and that he read T. Thornton's June 11, 2011 e-mail in the investigation report as a recap of what the Complainant said and did not consider it a complaint involving safety issues by the Complainant. He testified that the fact that the June 11, 2011 comments by the Complainant to T. Thornton arose during discussion of the Rule 103 assessment in a sideswipe incident did not play any part in his decision to dismiss the Complainant from employment.

After deliberation on the credible evidence of record, this presiding Judge finds that the Complainant has failed to establish by a preponderance of the evidence that he made a safety or

hazardous condition complaint on June 11, 2011 that was a contributing factor to his termination of employment on August 3, 2011.

II. The Respondent has demonstrated by clear and convincing evidence that it would have taken the same adverse employment actions absent the Complainant's protected activity.

In this case the Complainant was involved in a sideswipe incident during his June 5, 2011 night shift that resulted in sufficient damage to four rail cars that the incident became an FRA reportable incident. T. Thornton and D. Jones testified that FRA reportable incidents are considered safety issues. The June 11, 2011 conversation between T. Thornton and the Complainant which is the basis of this FRSA complaint occurred when T. Thornton called the Complainant outside B-tower to inform him that he was being assessed, i.e.: charged, with failure to protect the shove which resulted in the damage to four rail cars, the incident subject to the FRA investigation. Accordingly, the Complainant's verbal outburst occurred during a discussion of an FRA reportable incident initiated by Trainmaster T. Thornton and therefore may be considered as occurring during discussion of a safety issue. For reason set forth above, this presiding Judge found that the comments by the Complainant were not so intertwined that they could not be separated and that comments protected under the FRSA were not a contributing cause to the adverse suspension and termination of employment actions imposed. However, in the event that the Administrative Review Board clarifies further that such limited actions as occurred in this case on June 11, 2011 cannot be separated as a matter of law, the affirmative defense asserted by the Respondents in this case is herein evaluated.

If a complainant has made his *prima facie* case, an employer may be relieved of liability if the employer demonstrates, "by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior." 49 U.S.C. 42121(b)(2)(B)(ii). The clear and convincing evidence standard is more burdensome than preponderance of the evidence standard. "Clear evidence means the employer has presented evidence of unambiguous explanations for the adverse actions in question. Convincing evidence has been defined as evidence demonstrating that a proposed fact is highly probable." *Speegle v. Stone & Webster Constr., Inc.*, ARB Case No. 13-074, ALJ Case No. 2005-ERA-00006, slip op. at 26 (ARB Apr. 25, 2014)(internal quotations omitted). In *Speegle*, the Board also clarified that it is not sufficient for an employer to show what it "could have" done, but that an employer must prove by clear and convincing evidence what it "would have" done. *Id*. at 27. An employer may do so using direct evidence or circumstantial evidence such as:

1. evidence of the temporal proximity between the non-protected conduct and the adverse actions;
2. the employee's work record;
3. statements contained in relevant office policies;
4. evidence of other similarly situated employees who suffered the same fate; and,
5. the proportional relationship between the adverse actions and the bases for the actions."

Id. at 27-28. See also *Franchini v. Argonne National Laboratory*, ARB Case No. 13-081, 2015 WL 5781072 (ARB Sep. 28, 2015)

Additionally, when considering what the employer would have done in the absence of the protected activity, an ALJ must consider what facts would have changed absent the protected activity. *Id*. For example, "if the protected activity gave meaning and clarity to an outburst, then the fact-finder must keep in mind that the outburst may become ambiguous in the 'absence of' the protected activity." *Id*. at 28-29.

When determining the separate issue of whether the Respondent has established by clear and convincing evidence that the Complainant's June 17, 2011 suspension and August 3, 2011 were not due the Complainant's limited June 11, 2011 protected speech, this presiding Judge must consider "(1) how clear and convincing the independent significance is of the non-protected activity; (2) the evidence that proves or disproves whether the employer would have taken the same adverse actions; and (3) the facts that would change in the absence of the protected activity." *Speegle*, ARB Case No. 13-074 supra at 29.

The Respondent argues that it has proven by "clear and convincing" evidence that it would have dismissed the Complainant absent his alleged safety report because the Complainant engaged in serious misconduct. The Respondent also argues that none of the essential facts would change absent the Complainant's protected activity because the Complainant's inappropriate behavior during his conversation with T. Thornton - his use of profanity and statements related to shutting the yard down - were unrelated to any protected activity. The Respondent points to circumstantial evidence such as the close temporal proximity between the Complainant's inappropriate behavior during his conversation with T. Thornton and the assessment being entered for his conduct; the clear company policy prohibiting boisterous, profane, or vulgar language; the Complainant's work record that includes a major violation in the previous year; and the Respondent's consistent treatment of employees it has designated as similarly-situated to the Complainant.

The Complainant argues that the Respondent has not proven by "clear and convincing" evidence that it would have disciplined the Complainant absent his protected activity. The Complainant notes circumstantial evidence indicating that the Respondent's stated basis for disciplining the Complainant - his use of profanity and statements relating to shutting down the yard - is not "highly probable" because of the extent to which profanity is used in the Waycross yard. The Complainant also notes T. Thornton's testimony that she did not feel threatened during the conversation. The Complainant argued that the comparator evidence presented by the Respondent does not undermine the fact that "no one at Waycross was ever disciplined for using profanity." (CB at 38).

This presiding Judge finds that the Respondent's stated basis for disciplining the Complainant has been consistently clear and is "highly probable" to be true. While it appears that the Complainant is correct in arguing that not all employees who used profanity alone or in a casual setting were disciplined in strict accordance with the GR-2 policy, the Respondent has shown that employees who used profanity while quarreling with co-workers, used profanity while being insubordinate or arguing with company managers, used profanity and had poor work records, or

used profanity in situations other than day-to-day operations in the rail yard[16] were consistently disciplined under the GR-2 policy, and usually dismissed. Additionally, D. Jones credibly testified that he strictly disciplines employees, including managers, who use profanity when those incidents come to his attention. This evidence is consistent with the Respondent's explanation that factors such as the Complainant's other major violation within the year prior to the GR-2 violation and his statements that were consistently interpreted as a threat to shut down the yard warranted dismissal absent the Complainant's protected activity. Moreover, the Respondent had no reason to discipline the Complainant for his report of a hazardous safety condition because the Respondent already knew about the conditions that contributed to the sideswipe incident, had commenced a thorough investigation into the sideswipe incident, immediately instituted several changes in procedure to help prevent such an incident from happening again, and had plans to install equipment and track formation that would provide additional blowback protection[17] at the east end of the Bowl before the sideswipe incident occurred.

The Respondent has produced substantial circumstantial evidence that it would have disciplined the Complainant absent his protected activity. The Respondent has shown that incidents elevated to D. Jones' attention resulted in discipline even for profanity use alone. The Respondent has also shown that employees who used profanity with some additional factor such as also quarreling with co-workers or being otherwise insubordinate with company managers, having poor work records, or using profanity in situations other than day-to-day operations in the rail yard, were disciplined under the GR-2 policy up to and often including dismissal.

Mr. Middleton, the Complainant's sole documented example of use of profanity without dismissal is not sufficient to undermine the Respondent's evidence. The incident in which Mr. Middleton was involved is distinguishable from the incident for which the Respondent disciplined the Complainant and from the other similarly-situated employees disciplined by the Respondent pursuant to the GR-2 policy. Mr. Middleton's incident description indicates the GR-2 incident was more similar to casual uses of profanity, or a "slip of the tongue" as T. Thornton characterized the incident, by employees to other employees rather than to incidents for which the Respondent disciplined employees, such as when an employee was also being quarrelsome with coworkers or insubordinate with a manager. Additionally, whereas the Complainant had a "major" violation less than a year prior to his use of profanity with T. Thornton, Mr. Middleton had only a "serious" violation that was over two years prior to his GR-2 violation for use of profanity over the radio.

Respondent's evidence that it has not disciplined Mr. Royals for his numerous reports of hazardous safety conditions is of limited probative value. While there is some evidence indicating that every employee has a duty to report hazardous safety conditions, Mr. Royals' position on the safety committee may provide some level of official sanction and undermines the assertion that Mr. Royals and the Complainant are similarly-situated.

The Respondent's argument that the essential facts of the Complainant's conversation with T. Thornton would not change absent the Complainant's protected activity has merit. The

[16] Examples in the record include use of profanity with non-employees and customers. RX 61 at 211-223.
[17] RX 58 at 84.

conversation between the Complainant and T. Thornton, as described by both participants, remains coherent absent the Complainant's "expressed words" that may report a hazardous safety condition. The Complainant's protected activity is not necessary to give the conduct for which the Complainant was disciplined context or meaning. A coherent conversation in which the Complainant was informed that he would be charged in relation to the sideswipe incident, responded inappropriately with profane language, and made a statement that could reasonably be understood as a threat to shut down or slow down operations in the rail yard, exists without additional words from the Complainant involving safety or hazardous conditions. Credible testimony from B. Bennett and T. Thornton indicates that the Complainant's behavior would have been elevated to D. Jones' attention absent the Complainant's protected activity due to the degree of profanity reported by T. Thornton and the statements by the Complainant that were consistently interpreted as a threat to shut down or slow down operation at the yard.

Having considered and weighed all the relevant evidence of record and upon consideration of the Parties' arguments and the matters previously set forth, this presiding Judge finds that the Respondent has established by "clear and convincing" evidence that it would have taken the same unfavorable personnel action of suspending the Complainant from service on June 17, 2011 and terminating his employment on August 3, 2011 in the absence of the Complainant's alleged protected activity.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After deliberation on the entire record, including all the evidence of record and the arguments of the parties, this presiding Judge finds that:

1. At all times relevant to this proceeding, the Respondent was a railroad carrier engaged in interstate commerce within the meaning of the Railroad Safety Act as amended.
2. The Complainant was hired by the Respondent on February 21, 2005, as a conductor.
3. While employed by the Respondent, the Complainant was an employee of Respondent within the meaning of the Federal Railroad Safety Act, as amended, and its implementing regulations.
4. On June 5, 2011, the Complainant was performing assigned work coupling cars on Track B46 in Respondent's Rice Yard in Waycross, Georgia.
5. On June 17, 2011, the Complainant was charged with a major violation of CSX operating rule GR-2 based on his interaction with Respondent's Trainmaster T. Thornton on June 11, 2011.
6. On July 6, 2011, a hearing pursuant to the collective bargaining agreement was held before CSX Trainmaster Brad Cooper on the alleged CSX operating rule GR-2 violation by the Complainant.
7. Upon the decision of Jacksonville Division Manager D. Jones, the Complainant's employment was terminated by Respondent on August 3, 2011.
8. The Complainant appealed the termination of employment based on violation of CSX operating rule GR-2 under the consolidated Region Agreement between Respondent and United Transportation Union collective bargaining agreement then in effect.
9. The appeal of the Complainant's termination of employment under the terms of the collective bargaining agreement was denied on May 30, 2012.

10. The Complainant earned $35,884.58 gross from the Respondent in 2010, which included a 45 calendar day suspension period and earned $30,319.00 gross from the Respondent in 2011 from January 1 through June 5, 2011.
11. The Complainant has established by a preponderance of the evidence that he suffered adverse employment actions of suspension on June 17, 2011 and employment termination on August 3, 2011.
12. The Complainant has established by a preponderance of the evidence that he engaged in protected activity on June 11, 2011 under 49 U.S.C. §20109(b)(1)(A) by reporting a hazardous safety condition that the Waycross yard had not put in place sufficient measures to prevent sideswipe incidents from happening and that the results could reasonably lead to employee injury or death.
13. The Complainant has failed to establish by a preponderance of the evidence that his June 11, 2011 protected activity contributed to his June 17, 2011 suspension.
14. The Complainant has failed to establish by a preponderance of the evidence that his June 11, 2011 protected activity contributed to his August 3, 2011 termination of employment.
15. The Respondent has demonstrated by clear and convincing evidence that it would have taken the same adverse employment actions absent the Complainant's June 11, 2011 protected activity.
16. The Complainant did not engage in protected activity by reporting unsafe conditions in the Waycross Rail Yard involving insufficient lighting in the Bowl and a lack of yellow cross ties to let employees know where the tracks end as first alleged in the December 6, 2011 complaint when he was no longer employed by Respondents.
17. The Complainant is not entitled to any relief under the FRSA based on his December 6, 2011 complaint.

ORDER

IT IS HEREBY ORDERED that the complaint filed by the Complainant on December 6, 2011 is **DENIED and DISMISSED.**

Digitally signed by Alan L. Bergstrom
DN: CN=Alan L. Bergstrom, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=Newport News, S=VA, C=US
Location: Newport News VA

ALAN L. BERGSTROM
Administrative Law Judge

ALB/RMK/jcb
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) 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

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).