

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 25 June 2014

CASE NO.: 2013-FRS-00084

In the Matter of:

JASON RAYE,
Complainant,

v.

PAN AM RAILWAYS, INC.,
Respondent.

Before: Jonathan C. Calianos, Administrative Law Judge

Appearances:

Stephen J. Fitzgerald, Esq., Garrison, Levin-Epstein, Richardson, Fitzgerald & Pirrotti, P.C.,
New Haven, Connecticut, for the Complainant

Robert B. Burns, Esq., Pan Am Railways Corporate Counsel, North Billerica, Massachusetts, for
the Respondent

DECISION AND ORDER

I. STATEMENT OF THE CASE

This case arises from a complaint filed by Jason Raye (the “Complainant” or “Raye”) with the Department of Labor’s Occupational Safety and Health Administration (“OSHA”) against Pan Am Railways, Inc. (the “Respondent” or “Pan Am”) under the employee protection provisions of the Federal Rail Safety Act (the “FRSA” or the “Act”), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. 110-53, 121 Stat 266 (Aug. 3, 2007).

The FRSA complaint filed with OSHA alleged that Pan Am unlawfully retaliated against Raye for reporting safety hazards, reporting a workplace injury, and filing an FRSA complaint. On August 14, 2013, the Secretary of Labor (“Secretary”), acting through his agent, the Regional Administrator for OSHA, found that there was no reasonable cause to find Pan Am retaliated against Raye for reporting safety hazards or for reporting an injury, but there was reasonable cause to believe that Pan Am retaliated against Raye for filing an FRSA complaint. On September 12, 2013, Pan Am objected to the Secretary’s finding that it retaliated against Raye for filing a complaint and requested a *de novo* hearing before the Office of Administrative Law Judges (“OALJ”).¹

A hearing was held before me in Boston, Massachusetts, on February 24, 2014, at which time the parties were afforded the opportunity to present evidence and arguments. Formal papers were admitted into evidence as Administrative Law Judge Exhibits (“ALJX”) 1-13, and the parties’ documentary evidence was admitted as Complainant’s Exhibits (“CX”) 1-6 and Respondent’s Exhibits (“RX”) 1-4, 7-9, 15-18, and 23.² Testimony was heard from the Complainant, Jason Raye, and the Vice President of Transportation at Pan Am, John Schultz. The record is now closed, and the parties have submitted post-hearing briefs (“Compl. Br.” and “Resp. Br.” respectively).

¹ After the case was transferred to the OALJ, a dispute arose between the parties as to the scope of the issues to be heard *de novo* before me; the Respondent filed a Motion for Clarification, and the Complainant filed an objection to the Motion, to which Respondent replied. The Complainant argued that the hearing before me should encompass all allegations made in the FRSA complaint, including the allegations that Pan Am retaliated against him for reporting a safety hazard and a work injury, whereas Respondent argued that the case should be limited to OSHA’s finding that Pan Am retaliated against Raye for filing an FRSA complaint. After reviewing the employee protection provisions of the FRSA and the relevant procedural regulations, I ruled during a conference call held on February 19, 2014, that the Complainant was required to file timely objections to OSHA’s additional findings for the issues to be properly before me and because Raye did not file any objections, the current claim is limited to whether Pan Am retaliated against Raye for filing an FRSA complaint. *See* 49 U.S.C. §§ 20109(d)(2), 42121(b); 29 C.F.R. §§ 1982.106, 1982.107. My ruling as to the scope of the claim is laid out in the hearing transcript, pages 25-29, and incorporated herein by reference.

² Complainant’s objections to the admittance of Respondent’s Exhibits 5-6, 10-14, and 19-22 were sustained. Complainant’s objections to Respondent’s Exhibits 8-9 were overruled.

II. STIPULATIONS AND ISSUES PRESENTED

The parties have stipulated to the following facts in this matter:

1. Pan Am is a holding company which holds the common stock of Springfield Terminal Railway Company, which is a railroad engaged in interstate commerce;
2. Raye has been employed by Springfield Terminal Railway Company, a subsidiary of Pan Am as a conductor since April 2005;
3. Raye engaged in protected activity under the FRSA when he filed a complaint with OSHA under the Act on December 6, 2011, and Pan Am was aware of the protected activity.

Compl. Br. 1-2; Resp. Br. 1-2; TR 30-31.

The issues before me are: (1) whether Raye's protected activity was a contributing factor in Pan Am's decision to charge him with rule violations on December 23, 2011 and to conduct a disciplinary hearing on January 4, 2012; and (2) whether Pan Am would have taken the same adverse action against Raye absent any protected activity. Resp. Br. 2; Comp. Br. 2-3.

Based on the record as a whole, I find that Raye's protected activity of filing an FRSA complaint with OSHA was a contributing factor in Pan Am's decision to charge Raye with rule violations and hold a disciplinary hearing. I further find that Pan Am failed to prove that it would have taken the same adverse action in the absence of the protected activity, and thus Raye is entitled to relief under the FRSA.

III. BACKGROUND

On October 24, 2011, Raye injured his left ankle while working as a conductor for Pan Am. TR 46-47. He was riding the side of a boxcar and told the engineer to stop at an upcoming switch. TR 61-62. The engineer stopped the car above a pile of discarded rail ties that had been replaced on the railroad track. TR 62. Raye testified that when he stepped off the car, he placed

his right foot down on the ties and the ground seemed solid so he proceeded to step down with his left foot. TR 63. As he stepped down with his left foot, “something gave way and I rolled my ankle.” TR 63; *see also* RX 17. Raye testified that he did not fall, but rather “stumbled, caught myself, made sure and put a little bit of weight on my foot and realized something was wrong, and I sat down.” TR 63, 79.

Raye testified that he had reported the same discarded ties that he rolled his ankle on as a tripping hazard to his area manager, Dwynn Williams, three weeks earlier and nothing had been done to remedy the hazard. TR 64, 67; *see* RX 15 at 4, 11. Raye was taken to the hospital, where he was diagnosed with a left ankle sprain, and he missed one day of scheduled work, making the injury reportable to the Federal Railroad Administration (“FRA”). RX 17 at 2; TR 66, 69-70.

As a result of the October 24, 2011 injury, Pan Am charged Raye with a violation of its Safety Rule P-76(b), which states “Employee must: . . . b. Before getting on and off, carefully observe ground condition and be assured of firm footing,” and an investigative hearing was held on November 11, 2011. CX 1; CX 2; RX 15 at Ex. B; RX 18 at 2. At the hearing, Raye testified that on the day of the injury, he stepped down from the car with his left foot first and as he stepped down with his right foot, the pile of ties gave way and he rolled his ankle. RX 15 at 24, 27. He testified: “I caught myself. I did not fall over,” and he explained that he sat down after he rolled his ankle. RX 15 at 27, 29. John Schultz, the Vice President of Transportation at Pan Am, reviewed the hearing transcript and determined on November 28, 2011 that Raye violated Rule P-76 by stepping down from the car onto a pile of ties. CX 2. Schultz issued discipline in the form of a formal Reprimand. CX 2; CX 3.

Following the issuance of discipline, Raye contacted an attorney, Scott Perry, who drafted an FRSA complaint and filed it with OSHA on December 6, 2011, alleging that Pan Am retaliated against Raye for reporting a safety hazard and reporting an injury. TR 77-78, 105; CX 4. Raye testified that he did not write, sign or edit the complaint. TR 78. Raye testified that the December 6, 2011 complaint written by Attorney Perry was entirely accurate and consistent with his testimony in the investigative hearing except for the statement that he “fell hard to the ground” as he stepped off the car. TR 78-82.

On December 12, 2011, OSHA provided Pan Am notice of Raye’s FRSA complaint. CX 5. Pan Am’s legal department approached Schultz, who had previously reviewed the November 11, 2011 investigative hearing transcript, and asked him to review the FRSA complaint. TR 122; RX 16 at 6, 8. Schultz testified at trial that he found “a major discrepancy” in the complaint as to how the October 24, 2011 injury occurred. TR 122. Specifically, Raye stated in the investigative hearing that he did not fall but rather sat down after he rolled his ankle, whereas in the FRSA complaint he stated that as he stepped down from the car he “fell hard to the ground injuring his left ankle.” TR 123, 157, 165. Accordingly to Schultz, a “collective” decision was made to proceed with a second investigative hearing. TR 175.

On December 23, 2011, Pan Am sent Raye a letter charging him with the following:

Providing false statements to the Carrier and/or a government agency, in connection with your description as to how the incident that you were involved in on Carrier property on October 24, 2011, took place, which is in violation of Carrier Safety Rules PGR-C and PGR-L, which read, in pertinent part:

PGR-C – “Any act of insubordination, hostility, or willful disregard of the Company’s interests will not be condoned and is sufficient cause for dismissal

PGR-C – “Employees must conduct themselves in such a manner that their Company will not be subject to criticism or loss of good will.”

PGR-L- “Employees who are dishonest, immoral, vicious, quarrelsome, and uncivil in deportment or who are careless of the safety to themselves or of others will not be retained in the service.”

CX 6; *see also* RX 2.

Upon receiving the new charge letter, on December 27, 2011, Raye amended his FRSA complaint to include an allegation that Pan Am discriminated against him for filing the whistleblower complaint. RX 1.

The second Pan Am disciplinary hearing occurred on January 4, 2012. RX 3. Schultz testified that the purpose of the second investigative hearing was to determine how the October 24, 2011 injury occurred. TR 123, 146-47; RX 16 at 6. He explained that if Raye had fallen as stated in the FRSA complaint, it raised the possibility of additional rule violations, and if subsequent information discovered changed the cause of the injury, the company would be legally required to file an amended report with the FRA. TR 123-124; RX 16 at 9; *see* CX 23. Despite Schultz’s stated reasons for holding a second hearing, Raye testified that no one from Pan Am approached him about his complaint prior to sending him the December 23, 2011 charge letter and he was not provided an opportunity to explain any discrepancies prior to the hearing on January 4, 2012. TR 84.

On January 13, 2012, Melody Sheahan, the reviewer of the second hearing transcript, found that the charges against Raye were not sustained by Pan Am and no disciplinary action was taken. RX 3. In finding no rule violation, Sheahan relied on Raye’s testimony at the January 4, 2012 hearing that he did not sign, write, or review the FRSA complaint before his attorney filed it and his testimony that the statement in the complaint that he “fell hard to the ground” was inaccurate. RX 3; *see* RX 16 at 8, 33-36.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 20109 of the FRSA prohibits railroad carriers engaged in interstate or foreign commerce or its officers or employees from discharging, demoting, suspending, reprimanding or in any other way discriminating against an employee, in whole or part, for engagement in activity protected by the FRSA. Protected activity under the FRSA includes the filing of a complaint related to enforcement of the Act. 49 U.S.C. § 20109(a)(3). 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 outlined in the AIR 21. *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 evidence³ that: “(1) he engaged in a protected activity, as statutorily defined; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the unfavorable personnel action.” *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-00009, PDF at 5 (ARB Feb. 29, 2012) (*citing* 49 U.S.C.A. § 42121(b)(2)(B)(iii); *Luder v. Cont’l Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-00009, slip op. at 6-7 (ARB Jan. 31, 2012)); *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013, ALJ No. 2010-FRS-00012, PDF at 5-6 (ARB Oct. 26, 2012).

³ The “[p]reponderance of the evidence is the greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.” *Brune v. Horizon Air Indus.*, ARB No. 04-037, ALJ No. 2002-AIR-00008, PDF at 13 (ARB Jan. 31, 2006) (internal quotation marks omitted) (*quoting Black’s Law Dictionary* 1201 (7th ed. 1999)).

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 probable or reasonably certain.’” *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-00052, PDF 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)).

Pan Am acknowledges, and the evidence establishes, that Raye engaged in protected activity by filing an FRSA complaint with OSHA on December 6, 2011 alleging violations of 49 U.S.C. § 20109. TR 30; CX 4. Pan Am also concedes, and the evidence establishes, that it had knowledge of the protected activity. CX 5; TR 31, 153-54. Furthermore, Pan Am’s charges of rule violations on December 23, 2011 and its disciplinary hearing held on January 4, 2012 constituted adverse action taken by Pan Am.⁴ *See Vernace v. Port Auth. Trans-Hudson Corp.*, ARB No. 12-003, ALJ No. 2010-FRS-00018, PDF at 2-3 (ARB Dec. 21, 2012) (finding that an employer’s charging letter and disciplinary investigation constitutes adverse action under the FRSA). Accordingly, my analysis will focus on the remaining element of Raye’s case in chief—whether or not his protected activity was a contributing factor in the adverse action.

A. Contributing Factor

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.” *DeFrancesco*, ARB No. 10-114, PDF at 6 (*quoting Williams*, ARB No. 09-092 at 5). In establishing the contributing factor element, a

⁴ Pan Am does not contest in its brief that there was adverse action in this case.

complainant need not “prove that his protected activity was a ‘significant,’ ‘motivating,’ ‘substantial,’ or ‘predominant’ factor in a personnel action” but only that his protected activity “tends to affect in any way the outcome of the [employer’s] decision.” *Araujo*, 708 F.3d at 158 (quoting *Marana v. Dep’t of Justice*, 2 F.3d 1137 (Fed. Cir. 1993)). A complainant is not required to show retaliatory animus or motive to prove that his protected activity contributed to employer’s adverse action. *DeFrancesco*, ARB No. 10-114, PDF at 6; *Hutton v. Union Pac. R.R. Co.*, ARB No. 11-091, ALJ No. 2010-FRS-00020, PDF at 7 (ARB May 31, 2013).

A complainant can connect his protected activity to the adverse action directly or indirectly through circumstantial evidence. *Williams*, ARB No. 09-092, PDF at 6; *DeFrancesco*, ARB No. 10-114, PDF at 6-7. Direct evidence “conclusively links the protected activity and the adverse action and does not rely upon inference.” *Williams*, ARB No. 09-092, PDF at 6 (citing *Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-00028, PDF at 4-5 (ARB Jan. 30, 2008)); *DeFrancesco*, ARB No. 10-114, PDF at 6 (holding employer’s suspension of employee who reported job-related injury “violated the direct language of the FRSA”). A complainant may also rely upon circumstantial evidence, which:

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

DeFrancesco, ARB No. 10-114, PDF at 7; see also *Bechtel*, ARB No. 09-052 at 13 n.69; *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-00003, PDF at 13 (ARB June 24, 2011). Circumstantial evidence must be weighed “as a whole to properly gauge the context of the adverse action in question.” *Bobreski*, ARB No. 09-057, PDF at 13-14. This

is because “a number of observations each of which supports a proposition only weakly can, when taken as a whole, provide strong support if all point in the same direction.” *Bechtel*, ARB No. 09-057 at 13 (*quoting Sylvester v. SOS Children’s Vills. Ill., Inc.*, 453 F.3d 900, 903 (7th Cir. 2006)).

Recent Administrative Review Board “ARB” decisions have found that if the protected activity and the adverse action are “inextricably intertwined,” there exists a presumptive inference of causation. *See Henderson*, ARB No. 11-013 at 13 (finding a presumptive inference of causation where complainant’s investigation and discipline directly stemmed from his report of injury); *DeFrancesco*, ARB No. 10-114 at 7 (finding because complainant’s report of injury triggered the employer’s review of his personnel records and led to his suspension, his report of injury was a contributing factor to his suspension as a matter of law); *Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007, PDF at 8 (ARB June 20, 2012) (holding because complainant’s protected disclosures prompted the employer’s investigation that led to complainant’s discharge, the complainant’s disclosures were “inextricably intertwined” with the investigations that resulted in his discharge and complainant established the “contributing factor” element of his claim). The protected activity and adverse action are inextricably intertwined if the basis for the adverse action cannot be explained without discussing the protected activity. *See Hutton*, ARB No. 11-091 at 15 (Corchado, J., concurring).

In the instant matter, the December 23, 2011 charges and the resulting investigative hearing held on January 4, 2012 would not have occurred but for Raye’s protected activity of filing a complaint under the FRSA, as the charges and investigation arose out of statements made in the complaint. Schultz acknowledged that if Raye had not filed an FRSA complaint, there would have been no charge letter on December 23, 2011 or a second hearing. RX 16 at 23; TR

174. Accordingly, I find that the protected activity and adverse action are “inextricably intertwined,” and there exists a presumptive inference of causation between the protected activity and the adverse action taken.

The foregoing is sufficient for Complainant to meet his burden of establishing a contributing factor. However, I also note there is additional circumstantial evidence that Raye’s protected activity contributed to Pan Am’s decision to charge Raye with rule violations and commence a second investigation. First, there is temporal proximity in this matter. *Araujo*, 708 F.3d at 160. Pan Am received OSHA’s notice of the FRSA complaint on December 13, 2011, and on December 23, 2011, only ten days after it became aware of the complaint, Pan Am charged Raye with violations of Rules PGR-C and PGR-L, based on the allegations made in the complaint. CX 4; CX 5; RX 5 at 1.

Second, there is strong circumstantial evidence establishing that Pan Am’s reasons for taking adverse action are unworthy of credence, which further supports a finding that the protected activity contributed to the adverse action. *Brune*, ARB No. 04-037 at 14 (*citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)); *DeFrancesco*, ARB No. 10-114 at 6 n.19. Pan Am claims that it brought charges against Raye because there was a “major discrepancy” between the FRSA complaint and Raye’s prior testimony. Despite its assertion, Schultz testified that the FRSA complaint was entirely consistent with Raye’s prior hearing testimony except for the five words that he “fell hard to the ground.” Pan Am also alleged that the purpose of the second hearing was to find out how the October 24, 2011 injury occurred, yet this is inconsistent with the letter of December 23, 2011 charging Raye with serious, terminable offenses including dishonesty, insubordination, and hostility.

Considering the totality of the circumstances, I find that Raye has proven by a preponderance of the evidence that his protected activity of filing an FRSA complaint with OSHA was a contributing factor in Pan Am's charging him with rule violations on December 23, 2011 and holding a disciplinary hearing on January 4, 2012. Accordingly, the burden shifts to Pan Am to establish that it would have taken the same action absent the protected activity.

B. Respondent's Affirmative Defense

Once a complainant has shown that his protected activity was a contributing factor to the adverse employment action, the respondent is liable unless it can prove by clear and convincing evidence that it would have taken the same action absent the protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv); *Patino v. Birken Mfg. Co.*, ARB No. 06-125, ALJ No. 2005-AIR-00023 (ARB July 7, 2008); *see also* 49 U.S.C. § 20109(d)(2)(a)(i). The clear and convincing standard is a higher burden than a preponderance of the evidence and the respondent must conclusively demonstrate "that the thing to be proved is highly probable or reasonably certain." *DeFrancesco*, ARB No. 10-114 at 8; *Williams*, ARB 09-092 at 5; *Araujo*, 708 F.3d at 159. A respondent's burden to prove the affirmative defense under the FRSA is purposely a high one. *Hutton*, ARB No. 11-091 at 13; *see also Araujo*, 708 F.3d at 159-60 (noting the burden shifting analysis is intended to be protective of plaintiff-employees and is a "tough standard" for employers to meet).

Pan Am alleges that it had a lawful and valid reason for initiating a second investigation. Resp. Br. 10. Specifically, Pan Am contends there was a "major discrepancy" between Raye's explanation of the October 24, 2011 injury in the FRSA complaint and his testimony in the first disciplinary hearing that justified the charges brought on December 23, 2011. Despite Pan Am's

contention, Schultz conceded that the sole discrepancy he found in the complaint was the five words that Raye “fell hard to the ground” and that the remainder of the complaint was entirely consistent with Raye’s prior testimony.⁵ TR 159. Schultz further conceded that if Raye violated Rule P-76 by failing to assure firm footing when he stepped off the car, it would not make a difference whether he then fell, or rolled his ankle before sitting down. TR 177. Pan Am’s allegation that there was a “major discrepancy” is wholly incredible and unsupported by the evidence. The inconsistent statement in the complaint that Raye “fell hard to the ground” is negligible and does not justify Pan Am’s new charges and a second hearing.⁶

Pan Am argues that the second disciplinary hearing was necessary to clarify how the October 24, 2011 injury occurred, in order to determine whether there were additional violations on the day of the injury and whether it needed to report to the FRA any changes to the cause of injury. Resp. Br. 7. However, the charge letter made no mention of further fact finding into how the original injury occurred or the possibility of additional safety rule violations, but instead charged Raye with serious rule violations including insubordination, hostility, and dishonesty, that could lead to termination. CX 6. Furthermore, if Pan Am’s primary concern was to determine how the injury occurred, it could have informally asked Raye about the inconsistent statement rather than rushing to bring serious charges against him. Schultz admitted that under the Collective Bargaining Agreement managers can conduct an informal investigation without

⁵ Schultz agreed that both the prior testimony and the complaint stated that Raye hurt his ankle stepping down from a boxcar onto rail ties and he eventually ended up on the ground, and the only difference was whether or not he fell as he stepped down. TR 156, 159.

⁶ It is also noteworthy that the only reason Schultz found the discrepancy and charged Raye was because Pan Am’s legal department approached him, asking that he “review” the FRSA complaint.

bringing charges against an employee.⁷ TR 168. Raye was never asked to explain the inconsistency, and the first time he heard of any concerns from Pan Am was in the December 23, 2011 charge letter. TR 84.

Pan Am also argues that the fact that it has charged other employees in the past for dishonesty and false statements establishes that it would have taken the same action in this matter absent the protected activity. Pan Am presented two instances where its employees were charged with providing false statements during an internal investigative hearing. In August 2011, Schultz charged an employee with a PGR-L violation for providing testimony at an investigative hearing that was in direct conflict and “completely at odds” with a statement made to a company police officer. RX 9; TR 134. In July 2012, another employee was charged with providing false testimony during a Pan Am investigative hearing because his account of events could not have occurred given the short timeframe involved.⁸ RX 8; TR 134, 183-84.

Pan Am did not provide the hearing transcripts or determination letters from these two instances of employee discipline, and I therefore cannot compare the degree of false statements in those instances with the inconsistent statement made in the present case. However, Schultz testified that the hearing testimony of the other two employees charged with dishonesty was “completely contrary to the factual information [and] physical evidence.” TR 131. In contrast, Schultz conceded that the only conflicting statement in the present matter was the five words that Schultz “fell hard to the ground.” TR 159. Therefore, the very minor discrepancy found in

⁷ Although a charge letter and a formal hearing is required before disciplining an employee, Schultz testified that such a requirement does not preclude managers from first holding an informal investigation to decide whether to bring disciplinary charges. TR 168-70; *see also* TR 85-86, 124-45, 142.

⁸ Raye also testified that he was aware of one instance where a conductor was charged with dishonesty for lying in an internal disciplinary hearing. TR 108-09. It is unclear if this is one of the same instances referred to by Schultz.

Raye's complaint does not rise to the level of false statements involved in the other two occurrences and is not comparable.

Additionally, in the other two occurrences where employees were charged with dishonesty, the employees made false statements in the process of Pan Am's own internal disciplinary process. Here, Pan Am charged Raye with false statements made in a complaint filed with a federal agency.⁹ I find it wholly inappropriate for Pan Am to use its own disciplinary rules to allege false statements made in a formal complaint to the federal government. Pan Am would have had a full opportunity to address any discrepancies or alleged false statements made in the FRSA complaint during the OSHA investigation process, and this is in fact the proper venue for establishing the veracity of the parties' assertions. It appears that the only conceivable reason to bring internal charges against a claimant for statements made in a whistleblower complaint is to intimidate the complainant and discourage him from engaging in protected activity.

The evidence does not support Pan Am's assertion that it had a legitimate, non-retaliatory reason for the charges brought on December 23, 2011 or the investigative hearing on January 4, 2012, nor does it support its assertion that it would have taken adverse action against Raye if the inconsistent statement that he "fell hard to the ground" was in a document other than the FRSA complaint. Accordingly Pan Am has failed to establish by clear and convincing evidence that it would have taken the same adverse action against Raye absent his protected activity of filing an FRSA complaint, and Raye is entitled to relief under the FRSA.

⁹ Schultz testified that when he charged Raye he believed that Raye lied in the FRSA complaint, not in his testimony in the first investigative hearing. TR 192.

V. REMEDIES

A successful complainant is entitled to be made whole under the FRSA. 49 U.S.C. § 20109(e)(1). To be made whole, Raye is entitled to have his personnel record expunged of any reference to the December 23, 2011 charges or the January 4, 2012 disciplinary hearing. I find that Raye is also entitled to damages for emotional distress, punitive damages, and attorney fees, for the reasons discussed below.

A. Damages for Emotional Distress

The FRSA provides for “compensatory damages, including compensation for any special damages sustained as a result of the discrimination” under 49 U.S.C. § 20109(e)(2)(C). Compensatory damages include damages for emotional distress. *Barati v. Metro-North R.R. Commuter R.R. Co.*, 939 F. Supp. 2d 143, 152 (D. Conn. 2013). A complainant must prove compensatory damages by a preponderance of the evidence. *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-00047, PDF at 7 (ARB Aug. 21, 2011). A complainant’s credible testimony alone is sufficient to establish emotional distress. *Id.* at 7-8; *see also Simon v. Sancken Trucking Co.*, ARB Nos. 06-039, -088, ALJ No. 2005-STA-00040 (ARB Nov. 30, 2007).

Raye did not seek any treatment for his emotional distress, but did present credible testimony as to his emotional state in the time period between discovering he was being charged with additional violations for false statements and receiving a determination that he would not be disciplined. Raye testified that when he received the December 23, 2011 charge letter, he “instantly thought I was losing my job,” as the charges were terminable offenses. TR 86-88. He testified that he panicked, placed his head between his knees and tried to catch his breath. TR 87. He felt like he let his wife down and worried about being able to support his wife and two

young children financially. TR 87. He stated that he was a “wreck” waiting for the hearing—he could not sleep, was moody, and did not have an appetite. TR 88. He testified: “[I] took my frustration out on my kids when I shouldn’t have. I was intolerable to be around . . . I tried to put on a good face, but . . . as my wife told me I was miserable at acting . . . [T]he whole week and a half to two weeks between the letter and the hearing was just miserable.” TR 88. Raye continued to worry about his job and how he would support his family during the hearing process and waiting for a determination. TR 89-90. He testified that his anxiety, sleeplessness, and loss of appetite worsened as he waited for a determination. TR 90.

The fact that Raye was not ultimately terminated as result of the December 23, 2011 charges does not prevent an award of emotional damages. *See Anderson v. Amtrak*, 2009-FRS-00003, PDF at 25 (ALJ Aug. 26, 2010) (citing *Burlington N. v. White*, 548 U.S. 53 (2006)). However, the severity of the adverse action taken should be considered in determining the amount of emotional damages to be awarded. *See id.* Raye was charged with serious offenses with the possibility of termination if a violation was found, and he underwent a stressful investigation process that lasted several weeks, without knowing whether he would be terminated. Ultimately, however, he was not disciplined as a result of the investigation.

Considering that the evidence of emotional distress was limited to Raye’s testimony, without evidence of any medical or psychological treatment, and the fact that ultimately Raye was not disciplined as a result of the charges and investigative hearing, and after a review of other FRSA whistleblower decisions awarding damages for emotional distress,¹⁰ I find that Raye is entitled to \$10,000 in emotional distress damages.

¹⁰ *See, e.g., Griebel v. Union Pac. R.R. Co.*, 2011-FRS-00011(ALJ Mar. 18, 2014), *aff’d* ARB No. 12-038 (ARB Mar. 18, 2014) (awarding \$5,000 in compensatory damages where no evidence of medical or psychological

B. Punitive Damages

Punitive damages up to \$250,000 are authorized under the FRSA to punish unlawful conduct and to deter its repetition. 49 U.S.C. § 20109(e)(3); *BMW v. Gore*, 517 U.S. 559, 568 (1996). Relevant factors when determining whether to assess punitive damages and in what amount include: (1) the degree of the defendant’s reprehensibility or culpability; (2) the relationship between the penalty and the harm to the victim caused by the respondent’s actions; and (3) the sanctions imposed in other cases for comparable misconduct. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 523 U.S. 424, 434-35 (2001). Punitive damages are appropriate for cases involving “reckless or callous disregard for the [complainant’s] rights, as well as intentional violations of federal law” *Smith v. Wade*, 461 U.S. 30, 51 (1983), *quoted in Ferguson*, ARB No. 10-075 at 8-9. The ARB further requires that an ALJ weigh whether punitive damages are required to deter further violations of the statute and consider whether the illegal behavior reflected corporate policy. *Ferguson*, ARB No. 10-075, PDF at 8.

I find based on the evidence presented that Pan Am consciously disregarded Raye’s statutorily-protected rights under the FRSA, and in fact intentionally interfered with the exercise of those rights. Pan Am’s first reaction upon receiving notice of the FRSA complaint was to charge Raye with serious and terminable offenses including, but not limited to, dishonesty, insubordination, and hostility,¹¹ without first giving Raye an opportunity to explain the

treatment and no evidence of sleeplessness, anxiety, extreme stress, depression, marital strain, loss of self-esteem, excessive fatigue, or a nervous breakdown); *Bailey v. Consolidated Rail Corp.*, 2012-FRS-00012 (ALJ Dec. 31, 2012), *aff’d* ARB Nos. 13-030, -033 (ARB Apr. 22, 2013), *aff’d* Civ. No. 13-3740 (6th Cir. 2014) (unpublished) (awarding \$4,000 where there was credible testimony of emotional distress without any evidence of psychological treatment and the emotional distress was not entirely due to the unlawful retaliation); *Kruse v. Norfolk S. Ry., Co.*, 2011-FRS-00022 (ALJ June 22, 2012), *aff’d* ARB Nos. 12-081, -106 (ARB Jan. 28, 2014) (awarding \$4,000 in emotional damages as a result of 30-day suspension); *cf. Amtrak*, 2009-FRS-0003 (awarding \$60,000 in compensatory damages where complainant was terminated); *Barati*, 939 F. Supp. 2d at 152 (jury award of \$40,000 in emotional distress damages where complainant was terminated).

¹¹ Pan Am sent Raye the charge letter even before it responded to OSHA’s notice of the complaint. RX 5.

discrepancy. Pan Am failed to provide a legitimate reason for filing such charges, and the sole discrepancy in the FRSA complaint was a total of five words that were immaterial to how the ankle injury occurred and the initial investigation conducted. Pan Am did not take into consideration whether Raye's statutorily-protected rights were being respected under the FRSA before taking adverse action,¹² and in fact it was the legal department that asked Schultz to review the complaint, leading to the filing of charges against Raye.

The only rational explanation for bringing such baseless and serious charges against Raye following the filing of the FRSA complaint is that Pan Am utilized the process to intimidate and discourage protected activity, not only by Raye, but other employees of Pan Am as well. Although the charges were eventually dismissed, the fact that Raye was charged with such severe violations is sufficient alone to cause a serious chilling effect of dissuading employees from asserting their rights under the FRSA. I find that Pan Am's actions are an egregious, blatant, and willful act of retaliation.

Although Raye's additional claims of retaliation for filing a safety report and for filing a report of injury are not before me, the context of Pan Am's retaliation for filing the FRSA complaint is important in assessing punitive damages. Pan Am fosters a workplace culture that discourages employees from reporting on the job injuries. Schultz testified that when an employee reports a workplace injury, an adversarial process results. TR 188-90. When there is a reportable injury at Pan Am, 99% of the time formal charges are brought against the injured employee, and Schultz admitted that the investigative process can influence an individual's

¹² In fact, Pan Am attempted to downplay the fact that the charges were based on statements made in an FRSA complaint. At the second investigative hearing, Schultz proffered a blank sheet with only the one sentence from the complaint containing the five words constituting the discrepancy. RX 16 at 7. The full exhibit of the complaint was submitted only after Raye's representative objected to the one sentence excerpt. *Id.* Additionally, the hearing officer and charging officer (Schultz) only referred to the complaint as a "report," "statement" or "letter," despite Raye's request to refer to it as a complaint. RX 31-33.

decision to even report an injury.¹³ TR 71, 179, 182, 188; RX 16 at 24. Furthermore, by holding disciplinary hearings in virtually all instances where an injury is reported, in its account to the FRA, Pan Am attributes the cause of injury to the negligent actions of the injured employee rather than the railway. TR 117, 166-67, 177-78. No energy is expended and no investigation is conducted on what the railway may have done wrong when an injury occurs. The corporate mantra appears to be that if an injury occurs on the job, it must be the fault of the employee who was injured. This behavior of assigning blame to individual employees without a thorough examination of the underlying causes that lead to employee missteps is the exact type of behavior Congress was trying to prevent in enacting the FRSA. *See Amtrak*, 2009-FRS-0003 at 27-28, n.36.

Raye's original investigative hearing arose because he reported a workplace injury. RX 15 at 18. As a result of the hearing, he was issued a formal reprimand for a safety rule violation. The injury was attributed to his wrongdoing, despite the fact that Pan Am failed to remove the ties after Raye reported them as a safety hazard weeks prior.¹⁴ Raye then engaged in protected activity by filing a complaint under the FRSA with OSHA, and as a result, two weeks later he was charged with dishonesty- a terminable offense- and was subjected again to a formal investigative hearing. Raye testified that he is reluctant to report any injury or safety complaint at work for fear of going through another investigative process and the (real) risk of receiving discipline. TR 51, 93. He also testified that his experience has made him reluctant to file any

¹³ Pan Am's own managers directly discourage employees from filing injury reports. Raye testified that on one occasion he did not submit an accident report following an injury because his manager warned him "if you fill out an accident report there's going to be a world of shit that comes down on you." TR 53, 55-56.

¹⁴ The charging officer at the first hearing conceded that if Pan Am had removed the old ties that Raye had reported as a safety hazard, Raye would not have been injured. RX 15 at 17. Despite this admission, Raye was still disciplined for the injury and Pan Am suffered no repercussions for its own safety failures. TR 190.

further complaints with OSHA, and he questions whether he should have ever filed the instant complaint in the first place. TR 87, 93.

Upon review of other FRSA whistleblower decisions, it appears that more extensive punitive damages have been awarded where the ALJ has found egregious and systematic deterrents against the protected activity in question and where substantial punitive damages were necessary to deter company conduct in the future. *See Amtrak*, 2009-FRS-0003 at 27 (awarding \$100,000 in punitive damages where employer did not have any procedures in place to ensure compliance with federal anti-retaliation laws); *Griebel v. Union Pac. R.R. Co.*, 2011-FRS-00011 (ALJ Jan. 31, 2014), *aff'd* ARB No. 13-038 (ARB Mar. 18, 2014) (awarding \$100,000 in punitive damages where employer discouraged the filing of an injury reports and did not give appropriate consideration to employees' rights under the FRSA); *Barati*, 939 F. Supp. 2d 143 (reducing jury verdict of \$1,000,000 in punitive damages to the statutory maximum of \$250,000 where defendant's conduct was found to be highly reprehensible and the defendant acted in reckless disregard of complainant's safety and FRSA rights); *Cain v. BNSF Ry. Co.*, 2012-FRS-00019 (ALJ Oct. 9, 2012) (awarding \$250,000 in punitive damages where employer engaged in an intentional, willful conspiracy to deny the complainant his right to pursue his medical claim by making his work environment unbearable); *see also DeFrancesco v. Union R.R. Co.*, 2009-FRS-00009 (ALJ Apr. 3, 2013) (on remand from ARB) (summarizing the various amounts of punitive damages awarded in FRSA decisions).

I find that the circumstances in this matter are comparable to other FRSA cases where significant punitive damages were awarded. Although the harm to Raye is somewhat limited in this case as he was not ultimately disciplined, I find that a substantial award of punitive damages is necessary in light of the degree of culpability and egregious conduct by Pan Am and the need

to deter similar conduct in the future. Accordingly, I find that based on the facts of this case, Raye is entitled to the statutory maximum of \$250,000 in punitive damages.¹⁵

C. Attorney Fees

Raye is entitled to reasonable attorney fees under the FRSA. 49 U.S.C. § 20109(e)(2)(C). The Complainant's counsel may submit a petition for attorney fees and costs for his work before the Office of Administrative Law Judges within 20 days of receipt of this Decision and Order. Respondent's counsel has 20 days from receipt of the fee petition to file a response.

ORDER

For the foregoing reasons, I find that Raye has established that Pan Am retaliated against him in violation of the Federal Rail Safety Act for filing a whistleblower complaint with OSHA.

Accordingly, it is hereby ORDERED:

1. Pan Am Railways, Inc., shall expunge Jason Raye's personnel file of any reference to the December 23, 2011 charges or the January 4, 2012 disciplinary hearing;
2. Pan Am shall pay Raye compensatory damages in the amount of \$10,000 for his emotional distress as the result of the December 23, 2011 charges and the January 4, 2012 disciplinary hearing;
3. Pan Am shall pay punitive damages in the amount of \$250,000; and
4. Respondent shall pay the Complainant's reasonable attorney's fees and costs. The Complainant shall file a fee application within **20 days** of the date on which this order is issued. Should the Respondent object to any fees or costs requested in the application, the parties shall discuss and attempt to informally resolve the objections. Any agreement reached between the parties as a result of these discussions shall be filed with the court in the form of a stipulation. In the event that the parties are unable to resolve all issues relating to the requested fees and costs, the Respondent's objection shall be filed not later than **20 days** following service of the Complainant's fee application. **Any objection must be accompanied by a certification that the objecting party made a good**

¹⁵ To the extent it is relevant, Pan Am offered no evidence regarding its financial circumstances or its ability to pay an award of punitive damages in this matter. Given the lack of evidence on this issue and the statutory cap, I can only assume that Pan Am is well capable of paying punitive damages up to the statutory cap.

faith effort to resolve the issues with the Complainant prior to the filing of the objection.

SO ORDERED.

JONATHAN C. CALIANOS
Administrative Law Judge

Boston, Massachusetts

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

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

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

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

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

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

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